# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted]51

EDGAR F. LUCKENBACH ET AL., PETITIONERS,

vs.

W. J. McCAHAN SUGAR REFINING COMPANY AND [redacted] INSULAR LINE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

[redacted]

(25,573)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

# No. 743.

EDGAR F. LUCKENBACH ET AL., PETITIONERS,

*vs.*

W. J. McCAHAN SUGAR REFINING COMPANY AND THE INSULAR LINE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant-Appellee,
against
The Steamership Julia Luckenbach, Her Engines, etc.; Edgar F. Luckenbach, etc., Claimant; Edgar F. Luckenbach et al., etc., Claimants-Respondents-Appellants, and The Insular Line, Respondent-Appellant.

*Statement.*

1912.
June 3. Libel filed.
June 13. Amendment to 8th article libel filed.
July 30. Amendment to 7th article libel filed.
Sept. 17. Answer of Insular Line to libel filed.
Sept. 17. Petition of Insular Line to bring in third party, filed.
Sept. 18. Claimants' answer and interrogatories, filed.
Dec. 17. Answer to petition of Insular Line, filed.

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1913.
Feb. 21. Answer of libelant to claimants' interrogatories, filed.
Apr. 3. Answer of Insular Line to claimants' interrogatories, filed.
Dec. 22, 23. Cause tried before Hough, J.
1914.
Jany. 22. Decision rendered.
Feby. 7. Interlocutory decree filed.
Sept. 23, 30. Hearings on motion to limit liability.
Oct. 12. Opinion, granting motion to limit liability, granted.
1915.
Jany. 6. Final decree entered.
Jany. 9. Notice of appeal (Luckenbach) filed.
Jany. 9. Assignment of errors (Luckenbach) filed.
Jany. 20. Notice of appeal (Insular Line) filed.
Feby. 23. Assignment of errors (Insular Line) filed.

3 *Libel.*

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of The W. J. McCahan Sugar Refining Company against the steamship Julia Luckenbach, her engines, boilers, etc., and against the Insular Line, in a cause of contract, civil and maritime, alleges as follows:

First. The libelant is a corporation organized under the laws of

the State of Pennsylvania and having its office in Philadelphia, Pennsylvania.

Second. The steamship Julia Luckenbach is now in the Port of New York and within the jurisdiction of this Honorable Court.

Third. The respondent Insular Line is a corporation organized under the laws of the State of Maine, with its principal office at Bangor, Maine. Said respondent has and maintains an office and agent within this district.

Fourth. At the times herein mentioned the respondent Insular Line was engaged in business as a common carrier of merchandise between ports in the island of Porto Rico and the ports of New York and Philadelphia and operated the steamship Julia Luckenbach in such service under a time charter.

Fifth. On or prior to April 24th, 1912, there were delivered to the respondent Insular Line in good order and condition at San Juan, Porto Rico, by Giorgetti, Cintorn, Aboy & Company Sonc., sixteen thousand six hundred and twenty (16,620) bags of Centrifugal sugar for shipment on the steamship Julia Luckenbach at that port for transportation to Philadelphia; and on or prior to
4 April 25th, 1912, there were delivered to said respondent Insular Line in good order and condition at Arecibo, Porto Rico, by the same shippers nine thousand (9,000) other bags of Centrifugal sugar for shipment on the steamship Julia Luckenbach at that port for transportation to Philadelphia. That on the dates above mentioned the said respondent Insular Line signed and issued two sets of bills of lading, by the first of which it acknowledged the receipt of the 16,620 bags of sugar first above mentioned in good order and condition, and by the second of which bills of lading it acknowledged the receipt of the 9,000 bags of sugar above mentioned in good order and condition (except that there was noted thereon "25 bags wet with salt water, 44 bags slightly wet with salt water, 1 bag broken," and in both of which bills of lading it agreed to transport said sugar on said steamship Julia Luckenbach to the port of Philadelphia, and to there deliver the same in the like good order and condition (the perils of the seas and certain other perils in said bills of lading enumerated only excepted) to the libelant, The W. J. McCahan Sugar Refining Company. All of the said bills of lading contained the following provision:

"NOTICE.—This bill of lading constitutes the contract between the shipper or other agent of the owner of the property carried, and the Insular Line."

Sixth. All of the 25,620 bags of sugar were shipped on the steamship Julia Luckenbach, together with 7,380 bags of sugar consigned by bills of lading to the Cznarikow-Rionda Company or its assigns, and which the latter had sold to the Pennsylvania Sugar Company of Philadelphia, and the said steamship thereafter proceeded
5 from Porto Rico with said sugar on board and arrived at Philadelphia on May 16, 1912. The bills of lading for all of the sugar shipped on said steamship provided:

"It is understood that the first refinery at which the steamer calls the quantity called for by B/L is to be delivered regardless of marks."

Said steamship first called at the refinery of the Pennsylvania Sugar Company, at Philadelphia, where she delivered to that company 7,380 bags of sugar out of the total quantity on board and then proceeded to the refinery of the libelant, where she arrived on or about May 20th, and where she discharged and delivered to the libelant the sugar then remaining on board.

Seventh. That the sugar so delivered to the libelant was not in the like good order and condition, in which same was shipped, but that on the contrary several thousand bags thereof were delivered either wholly or partly empty, and a large quantity of the sugar was damaged by sea water, and that by reason thereof the libelant has suffered damage in the estimated sum of Sixty thousand dollars.

Eighth. Upon information and belief libelant alleges that the loss of and damage to its said sugar was caused by the unseaworthiness of said steamship Julia Luckenbach at the time said sugar was loaded, and that due diligence was not exercised by the owner of said steamship to make her seaworthy and fit to safely perform the voyage.

6 Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that process in due form of law may issue against said steamship Julia Luckenbach, her engines, boilers, etc., and that all persons interested therein may be cited to appear and answer all and singular the matters aforesaid, and that process also issue against the respondent Insular Line, citing it to appear and answer the matters aforesaid; that said steamship Julia Luckenbach may be condemned and sold, and that the respondent Insular Line may be adjudged to pay the amount of the libellant's said damages with interest and costs, and that the libelant may have such other or further relief as in law and justice it may be entitled to receive.

THE W. J. McCAHAN SUGAR
REFINING COMPANY,
By KNEELAND, HARISON &
HEWITT, *Its Proctors.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence Kneeland, being duly sworn, deposes and says that he is a member of the firm of Kneeland, Harison & Hewitt, the proctors for the libelant herein; that the foregoing libel is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by an officer of the libelant corporation is that none of its officers reside in or are within the City of New York, and that the sources of deponent's

7 knowledge and information are the bills of lading for the cargo, statements made to deponent by the Treasurer of the libelant, and by the surveyor who examined said cargo after its discharge at Philadelphia, the reports of a survey held on said steam-

ship at Ponce, Porto Rico, and the reports of surveys held on said steamship at New York after her cargo had been discharged.

LAWRENCE KNEELAND.

Sworn to before me this 1st day of June, 1912.

[SEAL.] MARTIN J. WILSON,
*Notary Public, Kings Co.*

Certificate Filed in New York Co.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant.*

43 Cedar Street, New York City.

8 *Amendment to Eighth Article of Libel.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,
vs.
THE STEAMSHIP JULIA LUCKENBACH, HER ENGINES, &c., and the INSULAR LINE, Respondent.

Amendment to 8th Article of Libel.

The libelant hereby amends its libel herein filed on June 3, 1912, so that Article Eighth thereof shall read as follows:

"Eighth. Upon information and belief libelant alleges that the loss of and damage to its said sugar was caused by the unseaworthiness of said steamship Julia Luckenbach at the times said sugar was loaded at San Juan and Arecibo, in that the fifth plate from aft in the B strake starboard side of her bottom was rusted, worn or corroded on the inside, causing a hole in said plate through which sea water entered her after-hold, and in that the suction pipes provided for pumping out water which might enter the after-holds, were choked and were not provided with sufficient rose boxes or strainers; that the above mentioned defects would have been disclosed and could have been remedied by the exercise of due diligence in the inspection and proper equipment of said steamship, and that the owners of said steamship failed to exercise due diligence to make
9 said vessel seaworthy in said respects and fit to safely perform the voyage."

THE W. J. McCAHAN SUGAR
REFINING COMPANY,
By KNEELAND, HARISON &
HEWITT, *Its Proctors.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence Kneeland, being duly sworn, deposes and says that he is a member of the firm of Kneeland, Harison & Hewitt, proctors for the libelant herein; that the foregoing amendment to the libel herein

is true to the best of deponent's knowledge, information and belief; that the reason why this verification is not made by an officer of the libelant corporation is that none of its officers reside in or are within the City of New York, and that the sources of deponent's knowledge and information as to the matters alleged in said amendment are reports made to deponent by surveyors who examined the said steamship Julia Luckenbach while on dry dock in the City of New York after the voyage mentioned in the libel, was completed.

LAWRENCE KNEELAND.

Sworn to before me this 12th day of June, 1912.

MARTIN J. WILSON,
*Notary Public, Kings Co.*

Certificate Filed in New York Co.

10 *Amendment to Seventh Article of Libel.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,

vs.

The Steamship JULIA LUCKENBACH, Her Engines, &c., EDGAR F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Claimant, and the Insular Line, Respondent.

Amendment to 7th Article of Libel.

The libelant amends its libel herein filed on June 3, 1912, so that Article Seventh thereof shall read as follows:

"Seventh. That all of the sugar shipped was not delivered to the libelant and a large quantity thereof was not delivered in the like good order and condition in which it was shipped. That 264 bags were not delivered, 6,671 bags were delivered empty, and 3,111 bags were delivered in a damaged condition, wet with sea water and with part of their contents missing, and that by reason thereof the libelant has suffered damage in the sum of $87,570."

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lawrence Kneeland, being duly sworn, deposes and says that he is one of the proctors for the libelant herein and that the
11 foregoing amendment of the libel herein is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by an officer of the libelant is that none of the officers of said corporation are or reside in the City of New York, and that the sources of deponent's knowledge and the grounds of his belief as to the matters alleged in said amendment are the possession of the invoice of said cargo, the written reports of surveyors who were present at the dis-

charge of said cargo and who examined same, the written reports of the weighers who weighed said cargo and the written reports of the chemist who tested same for polarization.

LAWRENCE KNEELAND.

Sworn to before me this 8th day of July, 1912.

[SEAL.] MARTIN J. WILSON,
*Notary Public, Kings Co.*

Certificate Filed in New York Co.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant,*
43 *Cedar Street, New York City, N. Y.*

12 *Answer of Insular Line to Libel.*

To the Judges of the United States District Court for the Southern District of New York, in Admiralty:

The answer of the Insular Line to the libel of the W. J. McCahan Sugar Refining Company against the steamship Julia Luckenbach and the Insular Line, in a cause of contract, civil and maritime, alleges as follows:

First. This respondent admits the matters alleged in the first article of the libel.

Second. This respondent admits the matters alleged in the second article of the libel.

Third. This respondent admits the matters alleged in the third article of the libel.

Fourth. This respondent admits that at the times mentioned in the libel it was the charterer of the steamship Julia Luckenbach, under a time charter, but it denies that it was operating the said steamship, as alleged in the libel, and avers that the said steamship at the times mentioned was being operated by its owners.

Fifth. This respondent admits the receipt by it for shipment of a quantity of sugar in bags upon the Julia Luckenbach at ports in Cuba, and the issuance of bills of lading therefor, but for greater certainty as to the contents thereof it refers to the original bills of lading. It denies any knowledge or information sufficient to form a belief as to the other matters alleged in the fifth article of the libel.

Sixth. This respondent admits the matters alleged in the sixth article of the libel, except that it denies that it has any knowl-
13 edge or information sufficient to form a belief as to whether or not 7,380 bags of sugar consigned by bills of lading to the Czarnikow-Rionda Company, or its assigns, at Philadelphia, had been sold by the consignees to the Pennsylvania Sugar Refining Company. This respondent alleges that the sugar delivered at Philadelphia was delivered on the order of the consignee named in the bills of lading.

Seventh. This respondent admits that a number of the bags of sugar delivered to the libelant had been damaged, and were partly

empty, in consequence of contact with sea water, but it denies that it has any knowledge or information sufficient to form a belief as to the details or extent of the damage, or as to the other matters alleged in the seventh article of the libel, as amended.

In connection with the amount of damages this respondent claims the protection of Clause 7 of the bill of lading, which provides that "in communicating the amount of any liability of the carrier, as carrier, bailee or otherwise, in respect of said goods, no higher value shall be placed upon said goods than the invoice cost * * * and in no case shall the carrier be held liable for any profits or increase of price or value over said invoice cost * * * or for any consequential or special damage.

Eighth. This respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the eighth article of the libel, as amended.

Ninth. This respondent admits the jurisdiction of the Court, but denies that it has any knowledge or information sufficient to form a belief as to the other matters alleged in the ninth article of the libel.

14 Tenth. For a further and separate defense this respondent alleges that the bills of lading under which the cargo referred to in the libel was carried contained the following provisions:

"It is also mutually agreed that the carrier shall not be liable as carrier or bailee for loss or damage occasioned by causes beyond its control, whether of like nature to those herein specifically excepted or not; by perils of the sea or other waters * * * or any latent defect in hull, machinery or appurtenances, or by unseaworthiness of the ship, even existing at the time of shipment or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship-owner or manager; by * * * other dangers or accidents of steam navigation of whatever kind."

The damage to the libelant's cargo by sea water during the voyage, as this respondent is informed and believes, was a damage by perils of the sea or other danger or accident of steam navigation; it resulted, as this respondent is informed, from a latent defect in the hull of the vessel not discoverable by the exercise of due diligence by the ship owner or manager; and it was a loss or damage occasioned by causes beyond the carrier's control, within the meaning of the foregoing provisions of the bills of lading.

Eleventh. For a further and separate defense this respondent alleges that the bills of lading under which the sugar referred to in the libel was carried, contained the following further provisions:

"It is further mutually agreed * * * that the carrier
15 shall not be liable for loss or damage to said goods, caused in whole or in part by causes which are insured against by or for account of the shipper, owner or consignee; and in case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

On information and belief this respondent alleges that the loss or damage to said goods complained of in the libel was caused, in whole or in part, by causes which were fully insured against by or for account of the shipper, owner or consignee of the cargo, and that, by virtue of the foregoing provision in the bills of lading, this respondent, as carrier, is not liable therefor. In case this respondent shall, nevertheless, be held liable for any part of the damage complained of, then, to the extent of such liability, this respondent is entitled to have the full benefit of the insurance that has been effected upon or on account of the said cargo.

Twelfth. For a further and separate defense, this respondent alleges that in pursuance of a time charter of the steamship Julia Luckenbach from her owners to this respondent, which was in force at all the times referred to in the libel, the owners of the steamer warranted to this respondent that the vessel was tight, staunch, strong and in all respects seaworthy, and fit for the service in which she was employed, and further covenanted that throughout the period of the charter party the steamship should be so maintained. The owners of the steamship were in possession of
16 her, and of all her equipment, and the master, officers and crew of the vessel were in the owners' employ. If there was any defect in, or unfitness of, said steamship, or her equipment or appurtenances, as alleged in the libel, and the libelants have suffered damage by reason thereof, this respondent avers that such damage arose from the failure of the owners to have and maintain the ship, her appurtenances and equipment in the seaworthy condition warranted by the charter party, and that any damage suffered by the libelants should be borne by and recovered from the steamship Julia Luckenbach, or her owners, and should not be borne by or charged against this respondent.

The owners of the steamer are Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach. A petition has been filed by this respondent making the said owners defendants herein.

Wherefore, this respondent prays that the libel herein be dismissed with costs, or that if any liability should be adjudged against the steamship and this respondent in favor of the libelant, then that such liability be enforced in the first instance against the bond for the steamship and against Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, in the proportions of their ownership in the steamship Julia Luckenbach, and that this respondent have judgment over against said steamship and the owners thereof, for any amount so adjudged against this respondent,
17 and that it may have such other or different relief as the justice of the cause may require.

CONVERS & KIRLIN,
*Proctors for Respondent.*

STATE OF NEW YORK,
*County of New York, ss:*

Robert W. McNeil, being duly sworn, says:

That he is the treasurer of the Insular Line, the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The sources of deponent's information and the grounds for his belief as to the matters stated in the answer are his familiarity with the affairs of the Insular Line and the matters referred to in the answer and the records at the Custom House. The reason why this verification is not made by the respondent is that it is a corporation.

ROBERT W. McNEIL.

Sworn to before me this 17th day of September, 1912.
[SEAL.] GEO. A. WASHINGTON,
*Notary Public, New York County.*

18 *Petition of Insular Line to Bring in Third Parties.*

United States District Court, Southern District of New York.

W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,
against
The Steamship JULIA LUCKENBACH and INSULAR LINE.

In Admiralty.

Petition to Bring in Third Parties under Rule 15.

The petition of the Insular Line praying that Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, be made parties defendant in the above entitled cause, respectfully shows to the Court as follows:

First. At all the times hereinafter mentioned the Insular Line was and it now is a corporation organized under the laws of the State of Maine, and has had an office for the transaction of business within this district.

Second. At all the times hereinafter mentioned, as petitioners are informed and believe, the defendant, Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach, was the owner of 54/80ths of the steamship Julia Luckenbach, Edgar F. Luckenbach, individually, was the owner of 10/80ths of said steamship, and John
19 W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, were the owners of 16/80ths of said steamship.

Third. On October 25 1910, Edgar F. Luckenbach, trustee of the estate of Lewis Luckenbach, acting, as petitioners are informed and believe, for all the owners of the steamship Julia Luckenbach, chartered the said steamship to the petitioner, Insular Line, under the usual Government form of time charter, for a period of three years and seven months, at the agreed hire of $6,000 per month, for service on the Atlantic coast, and in the Gulf of Mexico, with a range from Portland, Maine, to all safe ports in the Caribbean Sea. In and by said charter party the owners warranted to the petitioner that said steamship, at the time of her delivery under said charter party, should be tight, staunch, strong, and in every way fitted for the service, and should be maintained by them thereafter in a thoroughly efficient state in hull and machinery for and during the service. The vessel duly entered upon the performance of said charter [illegible] and, at all the times hereinafter mentioned, was operating thereunder in the petitioners' steamship line between the port of New York and ports in Porto Rico.

Fourth. In the month of June, 1912, process was served on this petitioner, under a libel filed herein on or about June 3, 1912, by the W. J. McCahan Sugar Refining Company against the steamship Julia Luckenbach and this petitioner, in a cause of contract, civil and maritime, upon a cause of action to recover damages in the sum of $60,000 in respect of a cargo of sugar which shortly theretofore had been transported in the steamship, under bills of lading
20 issued by this petitioner, as charterer, from ports in Porto Rico, and delivered, as was alleged, in a damaged condition at the port of Philadelphia. It was alleged in the eighth article of the libel, as amended, that the loss and damage to the libelant's sugar was caused by the unseaworthiness of the steamer, in that the fifth plate from aft in the B strake, starboard side, of her bottom, was rusted, worn, or corroded on the inside, causing a hole in said plate through which sea water entered her afterhold; and in that the suction pipes provided for pumping out water which might enter the afterhold were choked and were not provided with sufficient rose boxes or strainers. It was further charged that the above-mentioned defects would have been disclosed, and could have been remedied, by the exercise of due diligence in the inspection and proper equipment of said steamship; and that the owners of said steamship failed to exercise due diligence to make said vessel seaworthy in said respects and fit to perform the voyage safely.

Fifth. Process in rem against the Julia Luckenbach was issued in pursuance of the prayer of said libel, and on or about June 6th the estate of Lewis Luckenbach, as managing owner of the steamship, filed a stipulation for value in this Court with the American Surety Company of New York as surety, in the sum of $60,000, conditioned to pay the amount awarded by the final decree rendered by this Court or by any Appellate Court. Messrs. Kneeland, Harison & Hewitt, proctors for the libelants, entered into a stipulation with Peter S. Carter, Esq., proctor for claimant, on the foot of the stipulation for value to the effect that "the value of said steamship Julia Luckenbach is hereby fixed, for the purpose of bonding in

21 this suit, at the sum of $60,000, and the foregoing stipulation is approved as to form and sufficiency of surety."

Sixth. Subsequently, and on June 9, 1912, the libelants in said cause applied to the Court for leave to amend the seventh article of said libel by increasing the amount of the claim from $60,000 to $87,570. An order was entered on July 30, 1912, permitting the amendment to be filed, and the order allowing the amendment was served on the petitioner, as respondent under the original libel, on said date. No application has been made by the original libelant to rearrest the Julia Luckenbach, or for any increase in the agreed amount of the stipulation for value filed by the claimant, as aforesaid. The said suit now stands of record, as a libel against the petitioner for $87,750, and a libel against the Julia Luckenbach, limited by stipulation, to the sum of $60,000.

Seventh. At all the times mentioned in the libel, the Julia Luckenbach was manned and equipped by servants employed and paid by her said owners, who were bound by the charter party aforesaid to have and maintain the steamship in a seaworthy condition. If the libelant suffered damage by reason of the unseaworthiness of said vessel, as alleged in the libel, such condition of unseaworthiness was due to the fault and neglect of said owners and to the breach of the warranty of seaworthiness contained in said charter party, and was not due to any fault of this petitioner. Responsibility for said losses, as between the said owners and this petitioner, should rest upon said owners; and if liability for said cargo losses should be adjudged in said libel against the petitioner, then the petitioner would be entitled to indemnity from said owners in respect
22 thereof, at least to the extent that the claim as proved may exceed the amount of the aforesaid stipulation for value.

Eighth. The petitioner alleges that it will be in furtherance of the ends of justice to bring in Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach, individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, as parties defendant in this action under Rule 15 of this Court and in analogy with the provisions of Rule 59 of the Supreme Court, in order that the rights and liabilities of all the parties may be determined in one proceeding, and that this petitioner may obtain in the same proceeding the indemnity from said defendants to which it may be or may become entitled in respect of any liability that may be adjudged against it therein.

Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the petitioner prays that process in due form of law according to the rules and practice of this Court may issue against said Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach, individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, citing them severally to appear and answer the libel herein and this petition, and that the said defendants may be proceeded against in this action for the damages claimed in the libel, at least to the extent that said damages may exceed the amount of the afore-

said stipulation for value, and that the liabilities of the respective parties under the said libel and under this petition may be
23 adjudged and determined in this proceeding, or that the Court will grant to the petitioner such other or different relief as the justice of the cause may require.

CONVERS & KIRLIN,
*Proctors for Petitioner.*

STATE OF NEW YORK,
*County of New York, ss:*

Robert W. McNeil, being duly sworn, says:

That he is the treasurer of the Insular Line, the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The sources of deponent's information and the grounds for his belief as to the matters stated in the petition are his familiarity with the affairs of the Insular Line, the matters referred to in the petition and the records at the Custom House. The reason why this verification is not made by the petitioner is that it is a corporation.

ROBERT W. McNEIL.

Sworn to before me this 17 day of September, 1912.
[SEAL.]
GEO. A. WASHINGTON,
*Notary Public, New York County.*

24 *Answer of Edgar F. Luckenbach, Sole Trustee, etc., to Libel.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, managing owner of the steamship Julia Luckenbach, to the libel and complaint of the W. J. McCahan Sugar Refining Company, against the steamship Julia Luckenbach, her engines, etc., and against the Insular Line (impleaded), in a cause of contract, civil and maritime, alleges:

First. That the claimants of the steamship Julia Luckenbach have appeared and filed a claim to the said vessel as owners thereof, and have filed a stipulation for value, and the usual stipulation for costs.

Second. He admits the allegations of the first, second and third articles of the libel.

Third. He admits the allegations of the fourth article of the libel, but he alleges, upon information and belief, that as to this particular shipment of sugar set forth in the libel, as between the shippers and consignors and the Insular Line, Inc., the respondent herein, the said Insular Line and the said steamship were special or private carriers and not common carriers.

Fourth. He denies the allegations of the fifth article of the libel, except as hereinafter specifically admitted in this answer.

Fifth. He denies the allegations of the sixth article of the libel, except as hereinafter specifically admitted in this answer.

25 Sixth. He denies that he has any knowledge or information sufficient to form a belief as to the allegations of the seventh article of the libel as amended, and, therefore, denies the same.

Seventh. He denies that he has any knowledge or information sufficient to form a belief as to the allegations of the eighth article of the libel as amended, and, therefore, denies the same.

Eighth. He denies the allegations of the ninth article of the libel, which alleges "That all and singular the premises are true," but admits all the remaining allegations thereof.

Further answering, and as a first defense, the claimant alleges:

Ninth. That on or about the 25th day of October, 1910, at the City of New York, a charter party, in writing, was entered into between the estate of Lewis Luckenbach, owners of the good American screw steamship Julia Luckenbach of New York, classed "A-1," American Record, and the Insular Line, Inc., New York, N. Y., to charter the said steamship for a period of three years and seven months, time to commence at the expiration of the present charter May 31st, 1911, 7 A. M., to transport cargoes between the ports of the Atlantic Coast and the Gulf of Mexico, within a range from Portland, Maine, to all safe ports in the Caribbean Sea. That the said charter party was what is known as the Government form, a true copy of which is hereto annexed and made a part hereof; and under the terms and conditions of the said charter party the Insular Line, Inc., the respondent in this action, was to have the control and operation of the said steamship in so far as it related to the

26 loading and discharging of the said vessel, and the selecting and designating of a berth for the purpose of loading and discharging said steamship and that as between the owners and the Insular Line the said steamship was a special or private vessel, and not a general vessel or common carrier and that the claimant is informed and believes that the said consignors or shippers of the said cargo of sugar on the said vessel had knowledge of the chartering of the said steamship to the Insular Line herein, and of the terms and conditions of the charter party.

That in accordance with the terms and conditions of the said charter party it was, among other things, agreed:

"Where she may always safely lie afloat at all times of the tide."

It was also agreed:

"2. That the charterers shall provide and pay for all the coal, port charges, pilotage," * * * "and all other charges whatsoever, except those before stated."

"Charterers are to provide necessary dunnage and shifting boards."

"4. Hire to continue until her delivery in like good order and condition to the owners (unless lost) at New York."

"7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents

may direct, provided the steamer can always safely lie afloat at any time of tide."

"8. That the whole reach of the vessel's hold, decks and usual places of loading and accommodations of the ship (not more
27 than she can reasonably stow and carry) shall be at the charterers' disposal" * * *.

"9. The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency or other arrangements and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with the same."

"17. The act of God" * * * "and all dangers and accidents of the seas, rivers" * * * "steam navigation and errors of navigation, throughout this charter party always mutually excepted."

"20. General average, if any, to be according to York-Antwerp Rules, 1890."

"23. It is also mutually agreed that this charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act Relating to the Navigation of Vessels, etc.'"

Further answering, and as a second defense, the claimant, upon information and belief, alleges:

Tenth. That on or about the 13th day of April, 1912, the said steamship Julia Luckenbach left the port of New York, under the said charter to the Insular Line, Inc., the respondent herein, bound to certain ports in Porto Rico, with cargo; that from the time she left the port of New York up to the time said vessel arrived at the first port of entry, which is Ponce, she was tight, staunch, sound
28 and in every respect in a good seaworthy condition, and all the known and customary tests and methods of examination to determine her seaworthy condition were employed; that from the time the steamer arrived at Ponce, while there, and until she completed her discharge at that port and left there, while on her way to Aguadilla to discharge the balance of her cargo, up to the time she completed her discharge at that port and left there, during her voyage to San Juan, and on her arrival at San Juan to load cargo, the said vessel was tight, staunch and sound, and in every respect in a good seaworthy condition, and that all the known and customary tests and methods of examination to determine her seaworthy condition were employed, to wit: her pumps were sounded by the carpenter three times a day at regular intervals, that is, at 6 A. M., 12 noon, and 4 P. M., and the ship was reported dry.

That on the arrival of the steamship at San Juan on the 23rd day of April, 1912, she was ordered by the charterer, the Insular Line, the respondent herein, to go to the Quartermaster's Dock at San Juan to load part of the cargo of sugar; that during the time she remained at San Juan and up to the time she finished loading what cargo she was to receive there, she was in a good seaworthy

condition, as the same tests hereinbefore described were applied, and the ship was reported dry.

That on the 25th day of April, 1912, about 10.15 o'clock in the evening, the steamship was found to be aground; that on the 26th day of April, 1912, about 1.15 o'clock in the morning the said steamship was finished loading, and about 2.18 o'clock in the morning of the same day the said steamship left the Harbor of San Juan bound for Aricebo, and about 7 o'clock in the morning of the same day the said steamship came to anchor in the road-
29 stead at Aricebo, and about 8 o'clock of the same morning she commenced taking on the balance of the cargo of sugar; that from the time of leaving San Juan up to the time of her arrival at Aricebo the ship was in a good seaworthy condition, as the tests hereinbefore described were applied, and the carpenter reported the ship to be in a seaworthy condition.

That on the 27th day of April, 1912, about 7.30 o'clock in the evening the said steamship finished loading sugar at Aricebo—the ship's draft at the time was twenty-four feet ten inches forward, and twenty-five feet nine inches aft. That about 8.12 o'clock in the evening of said day the anchor was hove up and about 8.25 o'clock the course of the steamship was set to proceed to sea. The sea at the time was rough. That from the time the ship arrived at Aricebo to the time she left on the 27th day of April, 1912, she was in a good seaworthy condition, as the pumps were sounded by the carpenter, as hereinbefore described, and the ship was reported dry.

That on the 28th day of April, 1912, about 4 A. M. the wind was from the northeast, rough sea running, and the ship rolling and shipping heavy seas fore and aft, decks continuously filled with water; that at 8 A. M. on said day the wind was east southeast, high seas continuously filling decks with water fore and aft; that about 4 P. M. the wind and sea abated, but the decks were continuously filled with water, ship laboring heavily; that about 7.35 P. M. it was discovered that No. 3 and No. 4 holds contained about seven feet of water; orders were immediately given to start the bilge pumps going at once; that about 7.45 P. M. on said day the engines were stopped, but the pumps were going continuously in No. 3 No. 4 holds, water gaining slowly, wind east southeast, moderate sea.

That on the 29th day of April, 1912, about 5.05 A. M.,
30 the main engines were started full speed ahead, and the course of the ship was set for San Juan, Porto Rico, pumps going continuously, but water gaining on the pumps; that about 8 A. M. there was a strong east southeast breeze, sea rough, pumps going continuously, water gaining slowly on pumps, decks continuously filled with water; that about 4 P. M. on said day weather cleared, but a strong southeast wind was blowing, a rough sea running, and decks flooded with water, ship rolling and laboring heavily, pumps continuously going; that at 8 P. M. on said day the wind and sea continued the same, and pumps going continuously.

That on the 30th day of April, 1912, the weather was clear and fine, strong east southeast breeze blowing, a heavy head sea, decks

continuously flooded with water and the ship rolling and laboring heavily; that about 8 A. M. on said day, as the water was gaining on the pumps, the engines were ordered to be driven as hard as possible to enable the ship to reach port before she might sink and for the safety of the ship and cargo. The weather conditions and the wind continued the same, and the decks were continuously filled with water, pumps continually going, but water gaining. About 6.13 P. M. on said day Moro Castle was abeam, and about 7.03 P. M. the said steamship came to anchor in Porto Rico, with thirteen feet of water in No. 3 and No. 4 holds, pumps going and gaining on water slowly.

That from 7.35 o'clock in the evening of said 28th day of April, when it was discovered there was water in No. 3 and No. 4 holds, the ship carpenter kept sounding the pumps continuously to report to the master the quantity of water coming into the vessel, so the master would be thoroughly familiar with the condition of his ship.

31 That on the 1st day of May, 1912, five pumps were continually going in No. 3 and No. 4 holds, and about 6.30 A. M. on said day the vessel commenced discharging sugar out of No. 3 hold, and extra pumps were got from the shore, and all pumps were kept going continuously and were holding their own with the water; discharging sugar from the after end of the ship.

That every day thereafter the pumps were going continually, while cargo was being discharged from No. 3 and No. 4 holds, and that continued up to the 5th day of May, 1912, when No. 4 hold was dry. That about noontime of said day the ceiling was torn away and a diver was engaged to go down to find out leak was, and he found that the leak was on the star about 6 feet 8 inches from the keel, and about 6 feet aft coaming. Thereafter a wooden plug was temporarily inse the hole where the water entered, and temporary repairs were m by the diver by putting the bolt from the outside in, with a was and the nut inside screwed up tight and cemented between t frames. The pumps were kept going continually, pumping th water out of No. 3 and No. 4 holds until the 6th day of May, 191 at 6 P. M., when No. 3 hold was dry and ready for cargo.

That on the 6th day of May the sugar was transferred from N. 1 between decks into No. 4 hold, and on the 7th day of May, 1912, early in the morning commenced reloading sugar from lighters back into the ship, and continued doing so up to the 8th day of May when the ship was finished loading sugar. The ship's draft was 23 feet 1 inch forward and 23 feet 10 inches aft.

That on the 9th day of May, 1912, when an examination wa made of the plate where the leak was found, it was discovered

32 that a plate about 6 feet 8 inches from the keel and about 6 feet aft of the after coaming of No. 4 hatch on the starboard side, was covered with cement which was broken and over the cement was the ceiling, and over the ceiling was some permanent ballast. After clearing away the ballast, ceiling and cement a hole about 1¼ inch- in diameter was found, and that the plate was dented inward, showing that the dent was made from the outsid

into the hold of the vessel, and which indicated that the steamship had been resting on some hard substance while loading at San Juan. That after the cargo and the necessary coal had been loaded on said vessel, about 4.05 o'clock in the afternoon of the 9th day of May, 1912, she proceeded out of the harbor of San Juan on her voyage to Philadelphia. That from said time until her arrival in Philadelphia the pumps were sounded three times a day at the usual time hereinbefore mentioned, and the steamship made no water; that on or about the 16th day of May, 1912, in the forenoon, the said steamship was made fast to Pier 46, Philadelphia, and thereafter, on the 17th day of May, 1912, the ship commenced to discharge cargo.

Eleventh. That the said leak which was discovered in the hold of the ship, the dimensions of which was hereinbefore described, was not caused through any fault or want of care on the part of the master, officers or crew of said vessel, or the unseaworthiness of said vessel, but was caused by the steamship resting on some hard substance at the Quartermaster's Dock while she was aground there while loading, and while said steamship was in the possession and control of the charterer, Insular Line, Inc., the respondent herein, under the terms and conditions of Article 7 of the charter party
33 hereinbefore quoted, and more particular the terms and provisions of the charter party which requires the charterer, Insular Line, while loading or discharging the said steamship to have her "safely lie afloat at all times of the tide;" and that whatever damages the cargo sustained the charterer, Insular Line, is liable for, and not the claimants and owners of the steamship Julia Luckenbach, nship; subject, however, to all exemptions contained in lading under which the cargo was shipped, and the pro- the bills of lading hereinafter set forth, which releases the Line, respondent herein, and the claimants and the steam- from any damages the cargo of sugar sustained.

Twelfth. That there was nothing to indicate to the master, or e officers or crew of the steamship, while said vessel was loading San Juan, she was injured, or that she was injured from the e she left San Juan bound to Aricebo to finish loading, as she n t leak or show any signs of leaking when the pumps were sounded, and it was not until the vessel left Aricebo, bound on her voyage to Philadelphia, and got into the heavy seas, when the decks were flooded and the ship rolling heavily and straining, causing the material or other substance, whatever it might have been, that was embedded in the hole to become loose and drop out, that the ship began to leak in the part where the leak was afterwards discovered by the diver and the master and officers after discharging part of the cargo out of No. 3 and No. 4 holds at San Juan.

Further answering, and as a third defense, the claimant, upon information and belief, alleges:

Thirteenth. That the said cargo of sugar was shipped under bills of lading which the claimant is informed and believes were
34 issued and signed by the Insular Line, charterer of the said ship, the respondent herein, and delivered to the shippers nd consignors and the consignees, and that the bills of lading for

all of the cargo of the steamship Julia Luckenbach contained the following provisions:

"It is also mutually agreed that the carrier shall not be liable as carrier or bailee, for loss or damage occasioned by causes beyond its control, whether of like nature to those herein specifically excepted or not; by the perils of the sea or other waters; from any cause wheresoever occurring; or any latent defect in hull, machinery or appurtenances; or by unseaworthiness of the ship, even existing at the time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager; by collision, stranding, or other dangers or accidents of steam navigation of whatever kind, by heat, effects of climate, rust, sweat, change of character, drainage, leakage; nor for any loss or damage arising from the nature of the goods; nor for loss or damage caused by the prolongation of the voyage.

"It is mutually agreed that general average shall be payable according to the York-Antwerp Rules 1890, and as to matters not therein provided for, according to the usages of the port of New York. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors of navigation, or in the management of the steamer, or from any latent or other defects in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defect or the unseaworthiness was not discoverable by the exercise of due diligence), the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent or other defects or unseaworthiness.

"14. That this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled 'An Act Relating to the Navigation of Vessels, etc.'

"16. And finally, that in accepting this bill of lading the shipper, owner and consignee of the goods, and holder of this bill of lading, agree to be bound by all its stipulations and conditions, whether written, printed or stamped, as fully as if they were all signed by such shipper, owner, consignee or holder."

Article 7 of the bill of lading reads:

"And in no case shall the carrier be held liable for any profits or increase of price or value over said invoice cost, and not exceeding said value, or for any consequential or special damages."

Further answering, and as a fourth defence, the claimant alleges:

Fourteenth. That the said cargo of sugar was shipped under bills of lading which the claimant is informed and believes were issued and signed by the Insular Line, charterer of the said ship, the respondent herein, and delivered to the shippers and consignors and the consignees, and that the bills of lading for all of the cargo of the steamship Julia Luckenbach contained the following provisions:

"It is further mutually agreed * * * that the carrier shall not be liable for loss or damage to said goods, caused in whole or in part by causes which are insured against by or for account of the shipper, owner or consignee; and in case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

Upon information and belief the claimant alleges that the loss or damage to the said cargo of sugar mentioned in the libel herein was caused in whole or in part by causes which were fully
37 insured against by or for account of the shipper, owner or consignee of the cargo, and that in accordance with the provisions in the bill of lading, hereinbefore quoted, the said steamship, as carrier, is not liable for the same. If the steamship should be held liable for any part of the damages set forth in the libel, then to the extent of such liability the claimant is entitled to have full benefit of the insurance that has been effected upon or on account of said cargo, and entitled to subrogation of all rights of the libelant, shippers, consignors or consignees of said cargo under the policies of insurance effected upon said cargo.

Further answering, and as a fifth defense, the claimant alleges:

Fifteenth. That if it should be found that the said indented hole in the plate on the starboard side of said steamship was there at the commencement of the voyage from, or the shipment of the cargo at San Juan or Aricebo, but which was not discovered or discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination which were employed, and not discoverable by the exercise of due diligence by the ship owners or managers, and was due to some error or fault in the management or navigation of the steamer in placing her at a dock or wharf in the bay or river where there was not sufficient water for the vessel to at all times safely lie afloat and she grounded, as she did at the time or just before she finished loading at San Juan, then, in accordance with the terms and provisions of said bills of lading, and in accordance with Section 3 of Chapter 105 of the Act of February 13, 1893 (U. S. Comp. Stat., 1901, p. 2946), known as "The Harter Act," the said steamship or her owners, the claimants herein, shall not become or be held responsible for
38 the damage or loss the cargo of sugar sustained, or for the general average charges or expenses, resulting from faults or errors of navigation or in the management of said vessel; and that if the Court should find that the libelant should recover for

the damages to the cargo of sugar, the charterer, the Insular Line, Inc., the respondent herein, is liable to pay the same, as the owners used due diligence to make the said steamship Julia Luckenbach in all respects seaworthy, and to have her properly manned, equipped and supplied for the voyage.

Sixteenth. Further answering, and as a sixth defense, the claimant, upon information and belief, alleges:

That if the owners of the steamship Julia Luckenbach be found at fault for the damages set forth in the libel, then they desire and claim the benefit of the Limitation of Liability provided for in the Act of 1851, entitled:

"An Act to Limit Liability of Ship Owners and for Other Purposes, now Embodied in Section 4283 of the Revised Statutes of the United States, and the Acts Amendatory thereof and Supplemental thereto."

And that the liability of the owners of the said steamship Julia Luckenbach be limited to the value of the said vessel at the time of or immediately after the accident mentioned in the libel and the ending of the said voyage; and that the said damages set forth in the libel were done and occasioned without the privity or knowledge of this claimant; and that the value of the said steamship and the interest of the owners in said vessel at the time of or immediately after the said accident and the ending of the said voyage
39 was $60,000.00, and the freight due at the ending of said voyage amounted to $3,000.00.

Seventeenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the claimant prays that the libel herein so far as it affects the steamship Julia Luckenbach be dismissed, with costs; but if the Court should adjudge that the libelant's damages should be paid by the said steamship in the first instance, but the respondent, the Insular Line, Inc., is liable for the damages the libelant sustained, then that the claimants of the said steamship Julia Luckenbach shall have judgment or decree over against the Insular Line, Inc., respondent herein, for the amount so adjudged and decreed against the steamship and paid by her owners to the libelant; and that the claimant may have such other and further relief as may be just.

EDGAR F. LUCKENBACH,
*Sole Trustee of Estate of Lewis Luckenbach, Managing Owner of Steamship Julia Luckenbach.*

Sworn to before me this 12th day of Sept., 1912.
[NOTARIAL SEAL.] R. H. WHITTEMORE,
*Notary Public, New York Co.*

Certificate Filed in Kings Co.

PETER S. CARTER,
*Proctor for Claimant, 15 Whitehall Street, Manhattan, New York City.*

40 Interrogatories to be answered under oath by the offer of The W. J. McCahan Sugar Refining Company, the libelant, who is familiar with the shipment of the cargo of sugar on the steamship "Julia Luckenbach."

First Interrogatory. Are not the terms and provisions of the bill of lading, as set forth in article thirteenth of the answer herein, correct?

Second Interrogatory. Before, or at the time of, the shipment of the cargo of sugar, did not the shipper or consignor know that the Insular Line, Inc., was the charterer of the steamship Julia Luckenbach?

Third Interrogatory. Did not the shipper or consignor know of the terms or provisions of the charter party?

Fourth Interrogatory. Did not the shipper or consignor deal with the Insular Line, Inc., as charterer of the steamship Julia Luckenbach?

Fifth Interrogatory. Did not the libelant accept the cargo that was shipped on the steamship Julia Luckenbach as owner or consignee thereof, under the terms and provisions of the bills of lading issued by the Insular Line, Inc., the respondent herein, and more particularly the terms and provisions of the bills of lading set forth in the thirteenth article of this answer?

Sixth Interrogatory. Are not the underwriters, as insurers of the cargo of sugar, bringing this action as the real parties in interest, through The W. J. McCahan Sugar Refining Company?

Seventh Interrogatory. Does not the firm of Kneeland, Harison & Hewitt, Esqs., who have filed a libel for The W. J. McCahan Sugar Refining Company, the libelant herein, represent the underwriters, as insurers of the cargo of sugar mentioned in the libel, through W. J. McCahan Sugar Refining Company?

41 *Interrogatories to be Answered under Oath by the Officer of the Insular Line, Inc., the Respondent Herein, Who is Familiar with the Chartering of the Steamship, and the Shipping and Loading of the Cargo of Sugar:*

First Interrogatory. Is not the charter party annexed to this answer a true copy of the original charter party under which the steamship Julia Luckenbach was chartered by the Insular Line, Inc., from the owners?

Second Interrogatory. Are not the terms and provisions of the bills of lading, as set forth under article thirteen of this answer, correct?

Third Interrogatory. Was not there only one shipper or consignor of the cargo of sugar that was on board the steamship Julia Luckenbach?

Fourth Interrogatory. Before, or at the time of, the shipment of the cargo,

(*a*) did not the shipper or consignor of the cargo of sugar know that the Insular Line was the charterer of the steamship Julia Luckenbach?

(*b*) did not the shipper or consignor know the terms and provisions of the charter party?

(*c*) did not the shipper or consignor deal with the Insular Line as charterer of the said steamship?

Fifth Interrogatory. Did not the libelant, The W. J. McCahan Sugar Refining Company, accept the cargo that was shipped on the steamship Julia Luckenbach as owner or consignee thereof, under the terms and conditions of the bills of lading issued by the Insular Line, Inc., the respondent herein, and more particularly the terms and provisions of the bills of lading set forth in the thirteenth article of this answer?

42 *Answer of Edgar F. Luckenbach, Sole Trustee, etc., et al., to Petition of Insular Line.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY

vs.

THE STEAMSHIP JULIA LUCKENBACH and INSULAR LINE.

*Answer to Petition of Insular Line.*

The answer of Edgar F. Luckenbach, sole trustee of the estate of Lewis Luckenbach, Edgar F. Luckenbach, individually, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, to the petition of the Insular Line praying that they be made parties defendant in the above-entitled cause, respectfully shows to this Court and alleges:

First. That they have appeared and filed their notice of appearance herein.

Second. They allege, upon information and belief, that exceptions were filed to the petition of the Insular Line to have them brought in as parties defendant in the above-entitled action, on the grounds that they were already before the Court as claimants of the said steamship Julia Luckenbach; and thereafter, on the 22nd day of November, 1912, an order was entered herein overruling said exceptions and granting the prayer of the petition of the In-

43 sular Line to bring in said Edgar F. Luckenbach et al., as parties defendant.

Third. They admit the allegations of the first and second articles of the petition.

Fourth. They admit the allegations of the third article of the petition; and allege that the petitioner, the Insular Line, was to have the control and operation of the said steamship in so far as it related to the loading and discharging of said vessel, and the directing and designating of a berth for the loading and discharging of the said steamship, and that as between the owners and the petitioner herein the said steamship was a special or private vessel, and not a general vessel or common carrier; and that if the said steamship while under

the control and possession or operation of said petitioner under said charter should be in any way injured in her hull, machinery or equipment, through the negligence and want of care on the part of the petitioner, then the defendants, as owners of the steamship, or the steamship are not to be held responsible for unseaworthiness caused through the fault or negligence of the petitioner or its agents and servants.

Fifth. They admit the allegations of the fourth article of the petition, but deny the allegations of the eighth article of the libel, as amended, as set forth in said fourth article of the petition.

Sixth. They admit the allegations of the fifth article of the petition.

Seventh. They admit the allegations of the sixth article of the petition.

44 Eighth. They admit the allegations of the seventh article of the petition, which alleges:

"At all the times mentioned in the libel the Julia Luckenbach was manned and equipped by servants employed and paid by her said owners, who were bound by the charter party aforesaid to have and maintain the said steamship,"

but deny each and every other allegation of said seventh article except as hereinafter specifically admitted.

Ninth. They deny each and every allegation of the eighth article of the petition.

Tenth. They deny each and every allegation of the ninth article of the petition.

Eleventh. Further answering, and as a defense the defendants reiterate and make their answer, as claimants of the steamship Julia Luckenbach (a copy of which has heretofore been served on Convers & Kirlin, Esqs., as proctors for the Insular Line, the petitioner herein), filed to the libel of the W. J. McCahan Sugar Refining Company against the said steamship, a part of this answer, for the purpose of avoiding repetition, and besides the petitioner is a respondent under the libel filed in the above-entitled action; but if the petitioner desires that the defense set forth in the answer to the libel be fully set forth in this answer, then the defendants reserve the right to amend this answer and fully set forth said defense.

Twelfth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

45 Wherefore, the defendants pray that the petition of the Insular Line against them be dismissed, with costs.

EDGAR F. LUCKENBACH,
*Sole Trustee of the Estate of Lewis Luckenbach, and Individually, and on Behalf of John W. Weber and Hattie W. Luckenbach, Executors of Estate of Edward Luckenbach.*

Sworn to before me this 16th day of December, 1912.
[NOTARIAL SEAL.] R. H. WHITTEMORE,
*Notary Public, New York Co.*

Certificate filed in Kings Co.

PETER S. CARTER,
*Proctor for Edgar F. Luckenbach, etc., etc., Defendant.*
15 Whitehall Street, Manhattan, New York City.

46 *Libelant's Answer to Claimant's Interrogatories.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,
against
THE STEAMSHIP JULIA LUCKENBACH, HER ENGINES, etc., and the INSULAR LINE, INC.

Libelant's Answer to Claimant's Interrogatories.

Answer to interrogatories annexed to the answer of the claimant of the S. S. Julia Luckenbach.

Answer to First Interrogatory. The bills of lading do contain the terms and provisions set forth in Article Thirteenth of said answer.

Answer to Second Interrogatory. Deponent has no knowledge or information as to the subject-matter of said interrogatory.

Answer to Third Interrogatory. Deponent has no knowledge or information as to the subject-matter of said interrogatory.

Answer to Fourth Interrogatory. Deponent has no knowledge or information as to the subject-matter of said interrogatory.

Answer to Fifth Interrogatory. Libelant received 25,356 bags out of 25,620 bags of sugar as owner and consignee thereof under bills of lading issued by the Insular Line, which contained the
47 terms and provisions set forth in Article Thirteenth of said answer.

Answer to Sixth Interrogatory. In consideration of the insurers of the sugar advancing to the libelant the amount of the loss and damage thereto, as a loan and repayable only to the extent of any net recovery libelant might make from the carriers or bailees thereof on account of its loss, libelant agreed to enter and prosecute suit against the carriers of said sugar at the expense and under the direction and control of said insurers. This suit is being prosecuted by the libelant in accordance with the above agreement.

Answer to Seventh Interrogatory. The present proctors for the libelant were retained to represent it by direction of the insurers of the cargo.

(Sg.) RICHARD S. POMEROY.

EASTERN DISTRICT OF PENNSYLVANIA,

Richard S. Pomeroy, being duly sworn, deposes and says that he is the treasurer of the W. J. McCahan Sugar Refining Company, the libelant herein, is the officer of said corporation who is familiar with the purchase and receipt by the libelant of the sugar mentioned in the libel, and that the foregoing answers to interrogatories are true to the best of his knowledge and belief.

(Sgd.) RICHARD S. POMEROY.

Sworn to before me this 20th day of February, 1913.

[SEAL.] GEORGE BLAESE,
*Notary Public.*

Com. expires Jany. 2, 1915.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant.*

48 *Answers of Insular Line to Claimant's Interrogatories.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,

against

THE STEAMSHIP JULIA LUCKENBACH, HER ENGINES, BOILERS, etc., and the INSULAR LINE, Respondents.

Answers of the Insular Line, Respondent, to Interrogatories Annexed to the Answer of the Claimant of the Steamship Julia Luckenbach.

Answer to First Interrogatory. Yes.

Answer to Second Interrogatory. Yes.

Answer to Third Interrogatory. The cargo of sugar in the Julia Luckenbach was shipped as per bills of lading by one shipper or consignor.

Answer to Fourth Interrogatory.

(*a.*) Respondent has no knowledge or information as to the subject-matter of said interrogatory.

(*b.*) Respondent has no knowledge or information as to the subject-matter of said interrogatory.

(*c.*) Respondent has no knowledge or information as to the subject-matter of said interrogatory.

Answer to Fifth Interrogatory: Respondent understands that it did.

CONVERS & KIRLIN,
*Proctors for Respondent Insular Line.*

49 STATE OF NEW YORK,
*County of New York,*
*Southern District of New York, ss:*

Joseph D. Phillips, being duly sworn, says:

I am vice-president and secretary of the Insular Line, respondent herein. I am familiar with the chartering of the steamship Julia Luckenbach, and the operation of the Insular Line. The foregoing answers to the interrogatories annexed to the answer of the claimant of the steamship Julia Luckenbach are true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

The sources of my information and the reason for my belief as to the matters not within my own knowledge, are statements and communications received from officers and employees of the respondent.

The reason this verification is not made by the respondent is that it is a corporation.

JOSEPH D. PHILLIPS.

Sworn to before me this 3rd day of April, 1913.
[SEAL.] GEO. A. WASHINGTON,
*Notary Public, New York County.*

50 *Testimony.*

United States District Court, Southern District of New York.

Before Hon. C. M. Hough, District Judge.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant,
vs.
THE S. S. JULIA LUCKENBACH and THE INSULAR LINE.

NEW YORK, December 22, 1913.

Appearances:

Messrs. Kneeland, Harison & Hewitt (Mr. Kneeland) for Libelant.

Peter S. Carter, Esq., and Mr. Burlingham, for Claimant and Luckenbach.

Messrs. Convers & Kirlin (Mr. Kirlin) for the Insular Line.

The claims of the libel and answers are stated.

GEORGE B. OGDEN, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Kneeland:

Q. What is your business, Mr. Ogden?
A. Marine insurance.
51 Q. Are you a member of a firm?
A. The firm of Chubb & Son.

Q. Does that firm bear any relation to the Federal Insurance Company?

A. Managers.

Q. You are at the head of the Loss Department?

A. I am.

Q. And attend to the settling of losses, and the payment of losses?

A. Yes.

Q. Did the defendant Insurance Company insure the cargo of the steamship Luckenbach which was consigned to the W. J. McCahan Sugar Refining Company?

A. Half of the cargo.

Q. What part?

A. A half interest.

Q. Have you the policy?

A. I have (produces it).

Q. That is an open policy covering cargo and containing the usual covenants?

A. Yes.

The policy is offered in evidence and marked Libelant's Exhibit 1 of this date.

Q. I notice this policy is to another company; how was the McCahan Sugar Refining Company insured under that?

A. The certificates were issued under that policy.

Q. Have you the certificates that were issued?

A. I have.

Q. How many are there?

A. There are three.

They are offered in evidence and marked Exhibits 2, 3 and 4 of this date.

Q. After the loss occurred did you have an arrangement with the McCahan Sugar Refining Company in regard to putting them in funds?

A. We did.

Q. Was this agreement in writing?

A. It was.

Q. Signed by the libelant?

A. Yes.

52 Q. Have you that agreement with you?

A. There are two agreements.

They are offered in evidence.

Objected to as incompetent and as contradicting the terms and conditions of the bill of lading.

Objection overruled.

Exception.

Marked Agreement, July 10, 1912, Libellant's Exhibit 5 of this date.

Cross-examination by Mr. Burlingham:

Q. This Exhibit 5, which is the receipt you obtained on paying $49,000 odd to the libelant, is in your usual form of printed receipt?
A. Usual, only we don't consider ourselves liable for the loss; when we consider ourselves liable we use a different receipt.

Motion to strike it out.
Motion denied.

Q. And this is the form that you use when you regard your payment as a loan?
A. Yes.
Q. And was this a loan that was repayable to you by the insured?
A. On the conditions of that receipt.
Q. And those conditions were that if in this suit the libelant was unsuccessful you should regard the payment as absolute?
A. I think I understand you, Mr. Burlingham, but——
Q. (Repeated.) And those conditions were that if in this suit the libelant was unsuccessful you should regard the payment as absolute? In other words, your intent was and this receipt was on condition that if the McCahan Sugar Refining Company succeeds in a suit to be brought such as this, that then the amount advanced by you will be repaid, but if unsuccessful, then it is an absolute payment to them; is that right?
53
A. Yes.
Q. That isn't in accordance with the terms of the policy, of course; that is a matter that you arrange with the McCahan Sugar Refining Company for your own benefit; isn't that so?
A. I don't see that it is for our own benefit.
Q. But it was apparently outside the scope of the policy?
A. Yes, it was outside the scope of the policy.

By the Court:

Q. You don't think you are liable under the policy?
A. No.
Q. Then what did you produce the $49,000 for?
A. We often do.

By Mr. Burlingham:

Q. You mean just as an act of kindness?
A. No, we don't think it is fair to the insured to be between two stools; it is automatic very largely, if the ship owner isn't responsible in almost all cases we are; we almost always try to protect them, and to a large extent we protect ourselves in doing it.
Q. Some times there are provisions in the insurance policies which cover this matter?
A. There are sometimes provisions agreeing definitely to make the loan; there are none in this policy.
Q. And sometimes there are clauses in policies which cut off the rights of carriers in such cases, are there not?
A. Cut off the rights?
Q. Yes.

A. Yes, I think there was in our policy, in a way.

Q. What do you refer to?

A. I don't know whether I can show you the clause—
54 whether it meets your question; it is the clause here beginning "and warranted."

Q. "And warranted by the insured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto"; is that it?

A. Yes, and it goes on.

Q. "And for merchandise shipped under bill of lading, inserting a stipulation that the carrier may have the benefit of any insurance thereon?"

A. Yes.

Q. "And that any insurance granted herein shall not cover where any carrier or other bailee has insurance"; that has nothing to do with it?

A. No; you read it.

Q. That is the clause to which you refer?

A. That is the clause to which I refer.

Q. Were proofs of loss submitted to you in this case by the insured?

A. Yes.

Q. And was this payment the total amount of the loss?

A. It was the total amount as I remember it; there were two amounts there, I have forgotten.

Q. $49,555.48 and $2,304.16?

A. Yes.

Q. So it was, so far as the figures are concerned, a full payment of the loss?

A. Yes.

Cross-examined by Mr. Kirlin:

Q. Mr. Ogden, does this Exhibit 5, this receipt, constitute the whole of the transaction between the insurance company and the assured after the filing of the proofs of loss under the policy; that is, is there any agreement or understanding outside of this?

A. No, none at all. You are speaking of the receipt?

Q. Yes. Was there included among the proofs of loss a copy of the bill of lading?

A. I imagine so, Mr. Kirlin; I couldn't say positively.

55 Q. It must have been known, therefore, to the Federal Insurance Company at the time the receipt was given, and the $49,555.48 paid, that the bill of lading did contain a stipulation that the carrier should have the benefit of the insurance?

A. Oh, I think so, Mr. Kirlin.

Q. And if your view is correct that the loss was outside of the policy by reason of the breach of that warranty, of course you weren't under any liability?

A. That covers both causes.

Q. Isn't this receipt under the circumstances of this case intended

as a substantial waiver of those defences so far as the assured is concerned?

A. It is a substantial protection to the assured, but I don't know about a waiver.

Q. So far as the assured is concerned, you agreed to waive the fact that he had given the benefit of the assurance to the carrier and that the ship was unseaworthy if such were the fact?

A. I would rather put it another way—it isn't exactly that, Mr. Kirlin, if the vessel was not seaworthy, there was no policy, if she was not hurt the policy attached.

Q. Let us suppose, for the purposes of the argument, that a case should be presented in which the loss would not be recovered from the carrier?

A. Yes.

Q. You wouldn't expect the insurance of this cargo paid under the receipt to be returned to you by the insured?

Objected to.

Objection overruled.

A. No.

Q. So that the real effect of this transaction is that you have advanced to the assured the amount of his loss in the form of a loan and your sole recourse in respect to that loan is limited
56 to what you may realize in this proceeding out of the steamer or out of the charterer?

A. That is true.

Q. And there is no recourse against the assured for the amount of this loan under any circumstances?

A. Except through what recovery they can make in this case.

Mr. Kneeland offers in evidence receipts to policies of the St. Paul Fire Marine Insurance Company covering 3/16 interest; the Thames & Mersey Marine Insurance Co., covering 1/8 interest; of the Aetna Insurance Co., covering 3/32; of the Mannheim Insurance Co., covering 3/32.

Marked Libellant's Exhibits, 6, 7, 8 and 9, respectively, of this date.

Mr. Kneeland also offers in evidence receipts signed by the W. J. McCahan Sugar Refining Company to these four companies.

It is stipulated that the representatives of the companies, if placed upon the stand, would testify that the amounts for which these receipts are given represent the full amount which would have been paid if they had paid the losses in the regular course, and that in no case is there any recourse by these companies against the libellant except to the extent of the recovery which it may make in this action.

The witness GEORGE B. OGDEN, recalled.

By Mr. Burlingham:

Q. Is the whole expense of this suit borne by the underwriters?
A. Yes.

Q. And the object of the suit is to make what recovery is possible for the insurance companies, your own and the others, on
57 account of this loss?
A. Yes.

By Mr. Kirlin:

Q. And the action is for their sole benefit, is it not?
A. For their sole benefit.

HARTVIG A. BAGGER, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Kneeland:

Q. What is your occupation, Captain Bagger?
A. I am a marine surveyor.
Q. By whom are you employed?
A. By F. Herrmann & Company.
Q. They are the managers and representatives of marine insurance companies?
A. Yes, sir.
Q. And one of those is the Mannheim Insurance Company mentioned here?
A. Yes, sir.
Q. Have you other duties as well; do you act for others?
A. Yes; I represent four Danish insurance companies.
Q. How long have you been connected with F. Herrmann & Company in this business?
A. About seven years.
Q. And before that what was——
A. For twelve years for the National Board of Marine Underwriters.
Q. As a marine surveyor?
A. Marine surveyor.
Q. And prior to that?
A. Prior to that I went to sea.
Q. Did you make an examination of the Julia Luckenbach in the latter part of May, 1902?
A. Yes, sir.
Q. Where was she?
A. On the 28th of May she was on Shewan's dry dock
58 at the foot of 26th Street, South Brooklyn.
Q. Were you alone or were you accompanied?
A. Mr. Black and Mr. Jobson were there, and Mr. Martin was there.
Q. Is that all?
A. Captain Brewster.
Q. Was anybody representing the Insular Line there, do you know?
A. Yes, there was somebody from the Insular Line; yes, a Mr.

Johnson was there from the Insular Line.

Q. That was on the 28th of May, 1912?

A. Yes,

Q. Did you make an examination of the vessel?

A. Of certain parts of her, yes, sir.

Q. Now, what part did you examine first?

A. She had been hauled out on the dry dock; she went on the dry dock about 11 o'clock, and they took nearly two hours to pump her up, so it was about 1 o'clock when we could see under the water, and we specially examined a place on the starboard quarter in the B strake where there had been made temporary repairs; there was a little piece of half-inch plate, about 5 by 5, with a piece of rubber under it, and there was a bolt going through that and screwed up on the inside; it was a diver's repair that stopped a leak.

Q. What was the condition of the bottom, with the exception of the place where the piece of plate was gone?

A. The paint on the ship's bottom was in good shape.

Q. Any indications at all of her having struck anything or rested on anything?

A. Yes, down on the keel the paint was wore off about 2½ or 3 inches on the keel, where it showed she had been dragged through mud.

Q. What kind of a keel has she?

A. Bar keel.

Q. How deep is her keel, do you know?

A. As far as I know 9 or 10".

59 Q. But with the exception of this scraping of the paint, and the paint itself, what was the condition of the outside of the vessel?

A. There was a good deal of scale and worse, but it was covered by paint.

Q. The paint was intact?

A. The paint was intact, and no mark on it of any kind.

Q. After examining this place on the outside was that piece of plate removed?

A. Yes, sir, that patch was removed.

Q. Did you go inside of the vessel then?

A. Not just then, afterwards.

Q. Just describe what you found where that piece of plate appeared?

A. We found a hole there that would measure fully an inch and three-quarters in length, and fully three-quarters inch across, an oblong hole.

Q. That is, right through the plate?

A. Right through the plate; and the edges of that hole were as sharp as a fine blade, you had to be careful not to cut your fingers in feeling in there.

Q. Do you know what the thickness of the plate was?

A. The original thickness of the plate was about ⅝; feeling in

through the hole, about half the length of my finger, I could feel about that thickness, about ⅝, but from there it gradually sloped down to the hole where the thickness of the plate was only the thickness of a fine edge.

Q. Did you subsequently examine it from the inside also?

A. Yes.

Q. What was the condition of the plate itself around the hole?

A. The plate itself, as I just told you, it was all rusted away there in that hole.

Q. The plate sloped down?

A. Sloped down to a fine edge.

Q. Did you take any measurements?

A. Yes.

Q. Where was this hole in position?

A. This hole was about 2 feet 10 inches from the forward butt, to that plate.

60 Q. How far was it from the stern of the vessel?

A. From the stern of the vessel it was—may I look at my memorandum that I made at the time?

Q. Yes.

A. The hole was 64 feet from the after end of the stern frame.

Q. You have spoken about its being in the B strake?

A. Yes, sir.

Q. Just tell us where that is?

A. Well, alongside the keel is the garboard strake; after that comes the A strake, and then the B strake; that is going upwards from the keel.

Q. Did you see any ballast in the vessel?

A. When I came inside of the vessel, yes, sir.

Q. Where did you find it?

A. In the after end of her on the port side it extended as far as right abreast of that hole, just past that hole; on the starboard side it was not as far forward by 4 feet as it was on the port side.

Q. What was it?

A. It was awful dirty.

The Court: What was it; you are not asked whether it was dirty or not.

The Witness: I think it was what we call dross.

Q. Slag?

A. Yes.

Q. Was there any compartment or division or bulkhead in the afterhold in that vessel?

A. No, it was one continuous hold from the cofferdam well back to the after peak.

Q. And do you know what that distance is?

A. 94 feet.

Q. What pumping arrangements did you find?

A. Well, there is two suction pipes at the afterend of the cofferdam.

Q. That is the cofferdam directly aft of the engine room?

A. Yes, that is a double bulkhead; but there are two suction pipes amidship just forward of that bulkhead.

61 Q. That is one on each side?

A. One on each side,—well, they are only about 2 feet apart.

Q. Any other suctions?

A. Yes, sir, a suction pipe that ran inside the tunnel away aft, so that it could be opened either side.

Q. How near to the after peak bulkhead was that?

A. That went back to within 8 feet 6 inches of the after bulkhead.

Q. Then what came?

A. Those two pipes went out, one on each side, out through the tunnel, out towards the wing and then through the tunnel and run forward for about—to a place 58 feet from the afterend bulkhead, and then a turn in toward amidships, and then they turned down in the bilge.

Q. Were those the only suctions?

A. Those four—no, that same pipe I spoke of that went through the tunnel, and that divided off in these two, also one away aft to the well in the tunnel which had no connection.

Q. How many turns did that make in the pipe which you have spoken of which came from the after bulkhead?

A. Well, that made three nearly right-angle elbows in each pipe.

Q. What did you see on that occasion as to the presence or absence of rose boxes?

A. The suction pipe on the starboard side on the after-part of the cofferdam had no strainer on it; it had some old packing wound around there, but there was no strainer there at that time.

Q. What was the condition of the pipe itself; did you examine that?

A. Yes, the pipe had some old manila wrappings in, rope yarn or packing, that had been submerged in bilge water.

Q. How many of the suctions did you see on that trip?

A. On that trip we only saw those two suctions on the forward end there.

Q. That is next to the cofferdam?

A. Next to the cofferdam.

62 Q. Those which were aft 57 feet, did you say, from the after bulkhead, and you couldn't see them?

A. You couldn't see them; they were covered up with ceiling at the time.

Q. When was the next time you examined her?

A. We was there on June 1st; Mr. Black, Mr. Jordan, Mr. Martin, Mr. Levering and I.

Q. And what did you examine?

A. We understood she had been cleaned out, that the ceiling was lifted up; there was only a small section, about 2 feet square, that had been left over the after suctions.

Q. Had anything been done to the dunnage?

A. Yes, the dunnage had been taken up and the ballast had been moved further back and boxed up with a wooden bulkhead.

Q. Did you visit her again?

A. Yes, sir.

Q. When was the next time?

A. On June 7th Captain Martin and Mr. Jordan and I went down there for to examine the condition of the frames, and the condition of the vessel, and we were refused admission on board of the vessel, first by the watchman and afterwards by Mr. Worke, and then by Mr. Luckenbach himself.

Q. Did you see her again?

A. Yes, sir.

Q. When was that?

A. On the evening of June 12th we got notice that the vessel would be ready for survey on June 13th at 10 A. M., and so Mr. Black, Mr. Jobson, Mr. Martin, Captain Brewster and Mr. Johnson from the Insular Line went to the vessel, and we found Captain Proctor and Mr. Smith from the Record there.

Q. What condition did you find then?

A. Then she had been cleaned up and had been all plastered up with cement.

Q. How much cement had been used?

A. I do not know how much but in a number of the afterframes, for thirteen floor spaces she had been filled up level with the floor.

Q. That would be about how deep.

63 A. Oh that would be 12 or 14 inches deep.

Q. You never had an opportunity of examining the condition of the bottom of that ship except on your first examination around the hole?

A. No.

Q. You went there on the 7th of June for that purpose did you not?

A. On the 7th of June we went there for the purpose of examining the inside of the vessel, the cement and frames and floors and skin of the vessel.

Q. And then you could not get aboard?

A. That was the time we were refused admission.

Q. And on the last visit the things had all been covered up?

A. Been covered up with cement.

Q. Now, Captain Bagger, judging from the condition of this plate the condition of the hold and what you saw there on the 28th day of May were you able to form an opinion from your experience as to what had caused the hole in that plate?

A. Yes.

Q. What opinion did you form?

A. That either the cement had been broken or the bilge water containing sugar acid had got behind the cement and rust- away the plate from the inside.

Q. Have you have any experience with the effect of sugar acid combined with bilge water on the iron of a ship?

A. Yes, iron pump pipes have been rusted away.

The Court: Was the Luckenbach an iron or a steel vessel?

The Witness: Iron, sir.

Q. What means are taken to prevent sugar acid and bilge water affecting the iron plating of a ship?

A. Down in the bottom it is cemented, and above that it is kept clean and painted.

Q. Is there any means used on steamers of this kind for
64 permitting an examination of the bottom?

A. Yes, sir, in a single bottom vessel like this there is generally a loose plank in the ceiling, or several of them, about three or four planks apart, so it can be taken up, and you have a chance to clean the limbers.

Q. The limbers on a single bottom ship of this kind is the bottom

A. They are in amidships in the lowest part of the bottom.

Q. Do you know whether there were any such in this vessel?

A. There were those planks there in the ceiling.

Q. How often is it necessary for a vessel carrying sugar cargo to lift these loose planks and examine the condition of the bottom and of the cement?

A. I believe they are different with different owners, some people make them every voyage and others again not.

Cross-examination by Mr. Burlingham:

Q. Did you see the Julia Luckenbach before this, Captain?

A. Yes, sir.

Q. On many occasions?

A. Yes, sir.

Q. You had surveyed her, had you?

A. Yes, sir.

Q. For the National Board, or for——

A. First I was for the National Board, and later for P. Herrmann & Co.

Q. You were perfectly familiar with her construction, were you?

A. Well, yes.

Q. Your examination of her was for insurance on the hull or on cargo?

A. For both.

Q. And you had found no fault with her construction previous to this, had you?

A. Oh, yes.

Q. Did you think that she was different from the ordinary type of steamer built in 1882, iron steamer?

A. I don't know as she was different; she was well enough constructed.

65 Q. She was well constructed, was she?

A. Yes.

Q. And had you passed cargoes that had been loaded on her from time to time?

A. I had reported to companies that I didn't consider her a desirable risk.

Q. But nevertheless they had covered cargoes on her, I suppose?
A. Yes.
Q. Over your body, so to speak?
A. Over my opinion.
Q. Your place was to criticise and examine fully without fear or favor, is that right?
A. Yes.
Q. And your companies—it was a matter for them to determine whether they should insure her or her cargoes or not?
A. Yes.
Q. And they frequently did insure cargoes on her?
A. I believe they did, sir.
Q. Have you any criticism to make of the piping system of this vessel?
A. Yes, sir.
Q. What is it?
A. The criticism I would make is that there are too many elbows in the suction pipe.
Q. And have those suction pipes been the same ever since you knew the Julia Luckenbach?
A. No, there has been a change in them; I knew the Julia Luckenbach when she was a tanker.
Q. I mean since she ceased to be a tanker?
A. I do not know.
Q. In your opinion it would be better if there were fewer elbows?
A. A great deal better.
Q. Is that your only criticism?
A. You mean of the suction pipe?
Q. Yes.
A. No; and there should be rose boxes on all the——
Q. I haven't got to those yet. You think the piping system would be better if it had less elbows?
A. Yes, sir.
Q. That is the end of your criticism with regard to that?
A. Yes.
66 Q. As to rose boxes, you would like to see a few more?
A. I would like to see a rose box, or a strainer on each suction.
Q. When you went down in the hold and found a strainer was wanting, there was evidence of a great deal of trouble down there, damage, wasn't there?
A. No, not to the pipe.
Q. Hadn't there been a great deal of cargo damage there?
A. Yes, sir.
Q. And hadn't the box, so to speak, slipped away and gone down among the pipes?
A. Yes.
Q. And molasses had been flowing there like water?
A. Yes.
Q. And it was not at all surprising that in those circumstances

you weren't able to locate the strainer of each rose box?

A. I think it was; the rose box is fast on the pipe; it can't get away from there on account of a little molasses.

Q. The rose box wasn't there?

A. No, sir.

Q. It was absent?

A. Yes.

Q. From where?

A. From the starboard pipe.

Q. Exactly where?

A. From the after end of the cofferdam.

Q. Is a rose box a little square box?

A. A square or round box with holes to prevent dirt coming into the pipe: these holes form the strainer.

Q. I think you better make a little plan of it on this piece of paper, and then we shall understand it better.

By the Court:

Q. Do many vessels have rose boxes over the end of the piping and a strainer fitted into the pipe?

A. No, the strainer is only on the scupper pipes.

Q. It is for the purpose of clearing out alleys; you expect to find as an ordinary construction this rose box on the end of each pipe?

A. Yes, sir.

67 Q. And in this ship on the starboard pipe there was no rose box at all?

A. There was no rose box at that time.

By Mr. Burlingham:

Q. What day was that, the first of June?

A. That was on May 28th, sir.

Q. What other suctions did you see there that day?

A. Only the other one on the afterside of that cofferdam.

Q. Did that have a rose box?

A. Yes, sir.

Q. Strainer?

A. Yes, sir.

Q. Everything all right there?

A. Everything all right there.

Q. And the other were so far aft you couldn't see them?

A. No, sir.

Q. Did you see them?

A. Yes, sir.

Q. Were they all right?

A. They were all right when we saw them.

Q. The limbers of a boat constructed like the Luckenbach are just close to the side of the shaft tunnel, aren't they?

A. No, in that vessel the shaft tunnel didn't go all the way down.

Q. Well, at any rate they are about in the position——

A. They are under the shaft alley.

Q. The limbers of this vessel, instead of being out in the wings, in the bilges, as they are in some vessels, were more nearly amidships, weren't they?

A. Yes, sir.

Q. Now, to clean those limbers out it was necessary to lift up limber boards?

A. Yes, sir.

Q. And those are 10-inch planks?

A. Nine or ten inch.

Q. And pretty thick, about four inches?

A. No, not over three inches.

Q. And by lifting up two of those the whole limbers are exposed?

A. No, but you lift the two near to the tunnel, that allows
68 you to get at the middle, and two further in the wing, and that will enable you to wash down in the limbers.

Q. Did you at any time examine the limbers of this vessel?

A. Yes, sir.

Q. And to do so you lifted up those four planks?

A. They were all lifted up before we got there.

Q. They were not fixed in a permanent position, on a vessel like the Luckenbach, were they?

A. No, sir, they were not.

Q. They were fastened on to the floors, they could easily be lifted?

A. Yes, sir.

Q. And when they were lifted the whole limbers were exposed, were they?

A. Yes, two or three, whatever they would be.

Q. The rest of the ceiling was a permanent part of the construction of the boat?

A. Yes, sir.

Q. And it was bolted down?

A. Yes, fastened down.

Q. With what?

A. With bolts to the floor, an angle iron on the floor.

Q. Now, there is a ceiling 18 inches or 2 feet to the ship's bottom?

A. About that.

Q. That is a usual construction too, I suppose, is it, of a vessel of that type?

A. Yes, sir.

Q. Now, Mr. Kneeland asked you if you knew any custom with regard to opening the limbers and cleaning them out?

A. Yes, sir.

Q. And I understood you to say that some owners did it every voyage and others did not; is that what you said?

A. Yes, sir.

Q. Then there is no fixed custom, is there, in this port?

A. There is a rule what ought to be.

Q. There ought to be a rule?

A. I don't know as I could call it a custom.

Q. Do you know of any such established custom or rule?

A. No, I can't say I know of any established custom.

69 Q. Of course it is important in carrying cargoes to carry out all the pipe—with sugar cargo especially—and open the limbers and see that they are clean?

A. It is very important.

Q. Before every voyage?

A. Yes, sir.

Q. Because sugar chokes up the pipes as much as anything?

A. No, sugar don't choke the pipes; sugar and molasses will dissolve absolutely in salt water.

Q. If there is a big sugar damage there is always a stopping of pipes, a caking off, isn't there?

A. Not necessarily.

Q. You have frequently known it to happen, and you have testified about it in court?

A. Yes, I have testified about it.

Q. Now, let us come to the hull in the vessel; had you seen her on the dry dock previous to this?

A. I have seen her some time ago on the dry dock.

Q. Did you see her in January when she had a collision with the Horatius, the steamer Horatius?

A. I believe I did.

Q. Have you any book about what you did then?

A. No; but I am pretty certain I was there then.

Q. Do you go principally on account of the cargoes on these vessels?

A. No, for hull damage, and sometimes inspect a vessel previous to taking insurance on her, and act as a general surveyor for insurance companies.

Q. Now, don't you recall that in January, 1912, this steamer Julia Luckenbach laid at Shewan's Dry Dock, at 26th Street, and a large number of surveyors, including yourself, Mr. Smith, Captain Brickley and others, went there and saw her?

A. I remember I was there at one time, but I don't just remember what the date was; there was some propeller damage, if I am not mistaken.

Q. They drew the tail shaft off; do you remember that?

A. No, I survey too many of them.

70 Q. There was a good deal of damage forward as a result of the collision; doesn't that refresh your recollection?

A. Yes, I remember that.

Q. Now, why did you go ther-?

A. Because we were interested in the whole hull insurance.

Q. You went there for the insurance Company of North America, didn't you?

A. I don't think I did; I think I went there for my own company, for one of Mr. Herrmann's companies; but at the same time I am not positive.

Q. You sometimes do go for the Insurance Company of North America?

A. Oh, yes.

Q. She was on the dock then four or five days?
A. I believe several days.
Q. Do you recall whether you went there more than once?
A. It seems to me I was there the day after again, I am not positive.
Q. And your best recollection is that you went to examine her hull?
A. I believe I went there to see what we were doing in the way of repairs.
Q. But if you represented a company, as you probably did, you didn't go there simply casually?
A. The second time, if I had been there about something else I might call there casually to see what they were doing with the repairs.
Q. You are a very busy man and I didn't suppose that whenever you saw a vessel on the dock you would go and see her, like a man from the Record or from Lloyds.
A. I often go there again unexpected to see that the repairs we recommended are being carried out or not I make a practice of it.
Q. Did you examine her hull at that time?
A. I examined the damaged part of the hull at that time.
Q. Didn't you examine her bottom?
A. Not particularly. I had my opinion formed of that vessel long before, and had already let my underwriters know what
71 I thought of her, and I din't want to keep rubbing it in on them.
Q. Did you tap the plates, try the plates?
A. No.
Q. Do you carry a hammer with you?
A. I sometimes carry a little probe with a hammer head on.
Q. Do I understand that you had such a fixed idea or prejudice against that vessel that your examination of her was a pure formality?
A. Oh, no, but there were other points about that vessel why I didn't consider her a good vessel.
Q. Of course it is hard when you haven't your papers with you, but I wish you could tell me whether you found her hull in good sound condition at that time, in January?
A. At that time I found no more fault with the hull than I had always found with it.
Q. You don't like the shape of the hull?
A. Yes, sir, I like the shape of her hull.
Q. Do you like the bottom?
A. Yes, sir, I like the bottom.
Q. What is your objection to this boat?
A. Well, I will mention some of them: She was a very deep vessel, and too long legged a vessel for going to Porto Rico ports; she was very likely to get aground down there; she had a deck on her—a home-made affair made of yellow pine, and constructed apparently so that the seams on the under part were too large, they couldn't

keep them tight; and I had other objections.

Q. How about her bottom when you were there in January?

A. Her bottom was very full of scale and rust.

Q. Did they clean it and paint it?

A. They broomed it off and painted it but didn't scale it.

Q. You went to sea for a good many years, didn't you?

A. Yes, sir, for twenty-seven years.

72 Q. In wooden sailing vessels?

A. In wooden sailing vessels.

Q. You never were on a steamer in your life as an officer?

A. No.

Q. Now exactly how far from the keel was this bolt?

A. I haven't got that measurement.

Q. Give me your best judgment; you know it was in the B strake and you know the width of the strakes?

A. I don't know as I quite understand your question; do you mean on a direct line, or how much above the keel line it was?

Q. Well both.

A. Well I should say that it was about 7 feet from the keel on a direct line, and it was 3½ to 4 feet above the line of the keel; that is of course only my recollection, I can't swear to it.

Q. You have mentioned the distance as 64 feet from the stern?

A. Yes, sir.

Q. Were you there when the plate was drilled?

A. No, sir.

Q. You didn't drill any plates?

A. We didn't drill any plates, no, sir.

Q. At this hole it was thin, was it, quite thin, very thin?

A. Very thin right at the hole.

Q. By putting your thumb and finger in you could feel the full thickness of the plate?

A. Apparently the full thickness of the plate, yes, sir.

Q. Your opinion is that sugar acid had got through broken cement and eaten it away, is that it?

A. Yes, sir.

Q. You said either one or the other theory; what was the other?

A. I think I said either the water had got behind the cement, or the cement had been broken there and in that way the water had gotten in there.

Q. What is the usual thickness of cement in a place like that?

A. Two or three inches.

73 Q. And when you got there there was no cement around there?

A. No, it had been cut away for repairs.

Q. For how much of a space around it?

A. I don't exactly recollect, but it seems to me it was cut away for a couple of feet up to her frame, her intercostal.

Q. If her frame had been perfect and completely covered that part of the plate no damage would have occurred?

A. I do not think it would.

Q. You say that Mr. Luckenbach refused you admission to the boat?

A. Yes, sir.

Q. Didn't he tell you there was going to be a survey next week?

A. Yes, sir.

Cross-examined by Mr. Kirlin:

Q. Captain Bagger, what is the practical reason for carrying the after-suction pipe, which I understand you to say entered the hold, from the shaft tunnel, a distance of 58 feet or 56 feet, forward, before you come to the rose box?

A. I do not know, only that they possibly had the valve there and wanted a suction pipe further forward, and they used it instead of disturbing the other pipe.

Q. I don't understand that answer.

A. Well, I will try to make it plainer, sir: The only reason I can see for it is that the pipe had run along there in the first place, and they had that two-way valve there, and at one time possibly they had a suction aft there, or from some reason or other they found it desirable to have the suction further forward, and they joined the piece of pipe on it and led it further forward.

Q. The two-way valve is in the tunnel, as I understand it?

A. Yes, sir.

Q. And by leading that one way the suction draws from the hold?

A. Yes, sir.

74 Q. But it draws from the end of the suction pipe, does it not?

A. Oh, yes, from the end of the suction pipe.

Q. Now, I understand you to say that the end of the suction box up 58 feet from the afterend of the hold?

A. Yes, sir.

Q. Well, what was the practical reason for that, why was a rose box up 58 feet from the after-end of the hold?

A. I do not know.

Q. Was there any way at the afterend for letting water out?

A. No, for 58 feet there is no way of getting at the water.

Q. Are you quite sure of that? In some old ships, or ships of about that period, that have been in litigation here as I remember it, there was a gate in the afterend of the No. 4 hold, which is opened to let drainage go into a well; wasn't there such a gate in this ship?

A. I do not think there was.

Q. You remember some such arrangement as I speak of, do you?

A. Yes, sir.

Q. Are you sure there wasn't any such means of letting water out at the afterend?

A. There was one way of letting it out, there was one or two open lift holes, and water coming into the tunnel would go into the well and the straight pipe that ran back to the well would get at it; but that I don't believe was intended to be that way.

Q. Did you ever examine the afterend of the hold with suf-

ficient care to be able to say that there was a gate there?

A. Unless such a gate was cement that was put in, there was no such gate.

Q. There is a separate suction leading to the afterwell besides the one you have spoken of?

A. No, sir, that is the same pipe.

Q. Isn't there also a line that leads to the afterwell? If there wasn't you would need a three-way cock instead of a two-way cock.

A. I would rather not answer that question; but I don't
75 know as I could say positively; my recollection is that there was only one pipe running along there; but I wouldn't like to swear that there wasn't two, but I think there was only one.

Q. The effect of having that suction 58 feet from the afterhold, if the ship was by the stern there might be water in there which wouldn't be reached by that suction, even if it was in the best of order?

A. Yes, sir.

Redirect by Mr. Kneeland:

Q. Are these suction pipes which go forward to the rose boxes right under the ceiling which was covered by this ballast?

A. Yes.

Q. Where they went out from the tunnel and then go forward they were under the permanent ballast?

A. Under the permanent ballast, yes.

Q. Do you know of any change that was made in the suction arrangements between the time you first saw her and the time you last examined her?

A. Yes, there were some changes made.

Q. Can you tell us what they were?

A. I know there was a suction made aft in that hold.

Q. An additional suction?

A. Yes, an additional suction made aft in that hold; then there was some change made to the pumping arrangements, but what it was I can't state.

By Mr. Kirlin:

Q. Have you had any experience to enable you to form an opinion as to the length of time it would take to rust a plate through from a bilge water and sugar acid mixture?

A. No, I do not know as I have had sufficient experience in that; I would expect it would take a couple of years anyhow.

76 Q. You said you had had some experience with pumps?

A. Yes, a good deal of experience with iron pumps in vessels.

Q. In your experience is that a slow process?

A. Rather a slow process.

HUGH G. JOBSON, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Kneeland:

Q. What is your occupation, Mr. Jobson?
A. Marine surveyor.
Q. What experience have you had?
A. Thirty-three years.
Q. And with what institution are you connected at the present time?
A. London Salvage Association.
Q. The New York office?
A. Yes, sir.
Q. Do you remember making an examination of the steamer Julia Luckenbach on the 28th of May?
A. Yes.
Q. Who went with you, if anybody, from the underwriters?
A. Mr. Black.
Q. And where is Mr. Black now?
A. He is in England.
Q. Was the vessel on dry dock?
A. Yes.
Q. Did you examine outside before you went aboard of her?
A. Oh, yes.
Q. Will you tell us what you found out of the usual?
A. Oh, I examined it as regards to this hole in the bottom: there was a patch on it at the time, and the paint was undisturbed all around the patch.
Q. When that patch was taken off did you examine the hole?
A. Yes, sir.
77 Q. Did you take measurements?
A. Yes, sir.
Q. Will you tell us the dimensions of the hole?
A. About an inch and three-quarters by three-quarters to seven-eighths.
Q. Now will you tell us in what plate it was?
A. The fifth plate from the stern, and B strake.
Q. She is a barkine ship?
A. A barkine ship.
Q. Flat bottom or considerable rise?
A. As far as I remember she has a rise.
Q. Now, what was the condition of the plate right around the hole?
A. Outside you couldn't see much difference, but inside, of course, it was wasted away.
Q. How thick was the plate around the edge of the hole?
A. It was worn practically to a knife-edge.
Q. Do you remember what they did to repair that?
A. Yes, they drilled a lot of holes and put a patch on.
Q. When they drilled those holes did you take measurements of the thinness of the plate at those holes?
A. Yes, sir, at those holes.
Q. And did you subsequently make a drawing indicating the

position of the holes and the thinness of the plate at those holes?

A. Yes, sir.

Q. Is this the drawing which you made?

A. Yes, sir.

Q. Now those little circles represent the holes drilled in the plate?

A. Yes, sir.

Q. And taking this drawing as you made it—take the top of the paper which is marked "Julia Luckenbach"—what part of the vessel was damaged?

A. Forward.

Q. The Julia Luckenbach?

A. Yes.

Q. Where is the keel of the vessel?

A. On this side.

Q. To the right?

A. To the left of the way I am looking at the paper.

Q. This was on the starboard side?

A. On the starboard side.

78 Q. Opposite the first of these holes, to the right of the holes in the plate, I see you have marked 3/16"?

A. Yes.

Q. Does that mean that the plate in that position was worn to 3/16"?

A. Yes.

Q. And when you had gotten to the next hole it had gotten to ¼?

A. Yes, that is it.

Q. And to the last one to ⅜?

A. ⅜.

Q. And directly under the hole was the original thickness of one-half?

A. One-half, yes.

Q. Did you form any idea as to what caused that wasting of the plate?

A. Well, general deterioration, and also plates in a ship in that position generally are thin under hatchways, the corners of hatchways, they are always drilled there when the ship is drilled, and the acid from the sugar gets in.

Q. Did you notice the presence and position of certain ballast in the after part of that vessel?

A. I noticed there was ballast in the after part of the vessel.

Q. Did you notice how far it extended?

A. No; I think it is given in the report, in Mr. Black's report.

Q. Well, haven't you the dimensions in your own report?

A. I didn't make a note of that.

Q. You don't remember how far it was?

A. No, I don't.

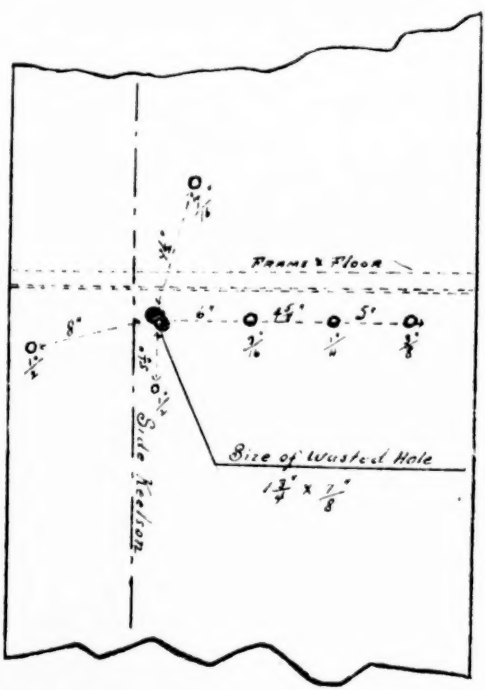
Q. Did you have anything to do with the examination of the suctions?

A. No, sir.

Ex #10
Cal. 4/4/13

78 1/2.

S.S. "JULIA LUCKENBACH"




No 743.

Luckenbach
v.
McCahan Sugar
Refining Co.

P 78 1/2

By the Court:

Q. I understand you to mean by the diagram from which you have answered Mr. Kneeland, that you found the original or maximum thickness of the plating of this vessel to be a half inch?

A. Those are the actual figures which I got from the holes which were drilled.

(Here follows diagram marked page 78½.)

79 Q. Did you or did you not form a judgment as to what was the intended thickness of the plating of this vessel?

A. Well, I should think—of course, I don't know what the usual thickness was; half an inch would have been thick enough.

Q. You did find in some of these holes a half inch of thickness?

A. Well, surrounding the hole, yes; as shown on the plan.

Q. Did the surveyors make these holes, or were they there already?

A. They were there already.

Q. You measured these holes after the patch had been taken off?

A. No, they were just drilling the holes.

The drawing is offered in evidence and marked Libelant's Exhibit 10, of this date.

Cross-examined by Mr. Burlingham:

Q. Were those the holes that were drilled for the purpose of making permanent repairs to that plate?

A. Yes, sir.

Q. The shipwrights had done that?

A. Yes, sir.

Q. And you measured them afterwards?

A. Yes, sir.

Q. Would that, in your judgment, be a proper way to repair the damage there?

A. No; well, I would rather have had a new plate in.

Q. But you thought this was safe and proper enough, but not so good as a new plate; is that it?

A. Not as good as a new plate—but that had nothing to do with it.

Q. Did you make any independent drilling, yourself?

A. None whatever.

Q. Do you recall what day you were there?

A. I think it was the 28th of—may I look at my book?

Q. Certainly.

A. The 28th of May.

Q. Did you examine the vessel at all, or merely go to look
80 at this hole?

A. Merely to look at the hole.

Q. At whose request?

A. Well, at the request of Mr. Black.

Q. Your superior?

A. Yes.

Q. The American representative of the London Salvage Association here?

A. The principal surveyor.

Q. Is he here now?

A. No, he is in England.

Q. Of course you frequently examine the hulls of vessels to see about the plates, whether they are in good condition or not?

A. No, only for damage.

Q. Do you mean you personally, or the Salvage Association, they only look after damages?

A. Practically only damages.

Q. Is it possible to ascertain whether plates are of the proper thickness by tapping with a hammer?

A. It depends.

Q. On what?

A. Well, of course, whether the cement is adhering to the plate or not.

Q. Well, if the cement is adhering to the plate it gives a result of a solid sound, and you can't tell——

A. I don't go round with a hammer, as a mechanic.

Q. You haven't had that experience?

A. No.

Q. But it is important of course that the cement should be in good condition and adhere to the plate?

A. It should.

Q. When it is broken up there is always danger from the acid of sugar, or something of that kind?

A. Yes.

By Mr. Kneeland:

Q. The cement was all gone around there?

A. It was broken.

Q. You had to break the cement away to get at the hole to
81 see it at all?

A. Well after I saw the patch off the cement was broken away.

By Mr. Kirlin:

Q. Could you tell from the condition as it was when you made the examination whether the cement which had originally been over the bottom of the ship, as distinguished from the cement that was put in in connection with the patch, showed there at all?

A. I couldn't tell.

Mr. Kneeland offers in evidence two bills of lading. They are marked Libelant's Exhibits 11 and 12, of this date.

Libelant Rests.

CARL AGRO, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. What is your business?

A. Scaler and contractor.

Q. How long have you been in that business?

A. About nine years.

Q. Here in New York?

A. No, in business.

Q. Business here in New York for nine years?

A. Yes, sir.

Q. How old are you?

A. I am thirty-one years old.
Q. What have you to do with the steamers here?
A. We do everything, scaling, cleaning, painting, cementing.
Q. Do you know the steamer Julia Luckenback?
A. Yes, sir.
82 Q. Have you attended to the scaling and cleaning of that boat?
A. Yes, sir.
Q. Is it on the inside or outside?
A. Inside and outside both.
Q. Did you, in November, 1911, go to that boat?
A. Yes, sir.
Q. What did you do?
A. I cleaned the bilge in No. 4 hold.
Q. How many men did you have there?
A. About fifteen men and foreman.
Q. When did you begin work, what time of day?
A. I don't remember exactly the day.
Q. What time of day, the hour?
A. In the morning.
Q. Did you go yourself?
A. I go one day before, I go and see the job, and the following day I sent men over there.
Q. What did you go the day before for?
A. To see the job.
Q. Did you see what was necessary to be done?
A. Yes, sir.
Q. What examination did you make?
A. The men was to clean the bilges, but before that I have to take a little ballast out of there, about two feet, the limbers, and then after the limber is out we have to clean her, wash it out.
Q. Was the ballast removed?
A. We removed some of the ballast; the ballast was lying on the plank, and we take a little ballast out and take a little cargo out just for cleaning.
Q. Who took up the limber boards?
A. I did, my men.
Q. Did you take any men with you the day before?
A. No, sir; one of the men on board helped me take the plank out, not only the ballast, the other one.
Q. What part of the hold?
A. The after hold, starboard and port side.
83 Q. And when your men came the next day did you come with them?
A. I went over about 9 o'clock; I told my foreman what to do.
Q. And then you went over about 9 o'clock?
A. Yes, sir.
Q. Were the men at work then?
A. Yes, sir.
Q. How many of them?
A. Fifteen.

Q. And how many hours were they there?
A. One day.
Q. Did you go again after 9 o'clock?
A. I go over in the night about half-past four.
Q. Had they finished their work?
A. Yes, sir, it was a very easy job: we cleaned it out.
Q. What did they do?
A. Cleaned it out; do whatever I say; cleaned the bilges, put it in good condition.
Q. Could you see the condition of the iron?
A. Yes, sir.
Q. Did you do any painting?
A. We don't do any painting.
Q. What did you do—scale?
A. We didn't scale that time, we was cleaning, take the mud out of the bilges.
Q. What was the condition of the cement.
A. It was right.
Q. What do you mean by that?
A. The cement was right, because the captain said if any of the cement is bad let him know.
Q. Do you do cementing, too?
A. Yes.
Q. When the cement is broken in a steamer, do you mend it?
A. Yes, sir.
Q. Do you furnish the cement?
A. Yes, sir.
Q. Is that part of your business?
A. Yes, sir.
Q. Had you done any work on the vessel before that?
A. Yes, sir.
Q. What month?
A. I don't remember exactly.
Q. Is this a bill of yours?
A. Yes, sir.
84 Q. These bills; do they refresh your recollection?
A. Yes, sir.
Q. What was the time previous to November, 1911?
A. I don't remember now—it was April 15th.
Q. Had you done the same thing then in April?
A. Yes, sir; but I didn't do any cementing in April, because the cement at that time was right.

Cross-examined by Mr. Kneeland:

Q. When you went there the night before what did you say you did; you took up the limber boards?
A. Yes, sir, just one to see if there is mortar down there.
Q. You took out one limber board?
A. One limber board.
Q. How long is that board?

A. Well, some—I can't tell the measure now, some is about 15 feet, some 10 feet.

Q. You said one?

A. Only one.

Q. And where was it?

A. It was on the center of the hold, between the bulkhead and the cofferdam, and the after bulkhead.

Q. That is all one big compartment, is it?

A. One big compartment, yes, sir.

Q. Was it aft of the after hatch, or forward of it?

A. It was four or five feet forward of the ballast.

Q. You didn't take up the ballast?

A. We get part of the ballast, because the limber hold, this board was under the ballast about two feet, and we have to take some of the ballast.

Q. That is the only board that was taken up under the ballast?

A. That was the day after, my men did that.

Q. What did the men do next day?

A. Clean the bilges, take some limber boards.

Q. Did they lift up all the ballast?

A. No, we put it on one side, we take from here and put
85 it here in the other corner (indicating).

Q. Did you take up then more than one board each side of the ship?

A. One on each side of the ship, one on the starboard side and one on the port side.

Q. You took up one strip of board running along by the shaft?

A. No, not by the shaft, between the shaft and the ship's side.

Q. That is all you took up?

A. That is all, just the one day; the following day we took a lot of them just for cleaning.

Q. I want to know what was done the next day?

A. They took lots from the limber hold and cleaned it out, one in here and one—to take one and leave the other, so we can see everything.

Examination of this witness suspended in order to get an interpreter.

2 P. M., After Recess.

Examination of the witness CARL AGRO continued with an interpreter; the interpreter having been duly sworn:

By Mr. Burlingham:

Q. I understood you to say that you went to the vessel one day in November to see about the job, and the next day you sent a gang of fifteen men and a foreman; is that right?

A. Yes, sir.

Q. When the men were there the next day did you see them, as you say, at 9 o'clock in the morning?

A. Yes, sir.

Q. And again at half-past 4?

A. At 7 in the morning; the gang was there at 7 in the morning.

86 Q. Did you go yourself the second day twice?

A. Once in the morning at 9 o'clock, once in the afternoon at half-past four.

Q. The first day that you were there how many limber boards did you take up?

A. Only one.

Q. The second day when your men were at work how many limber boards did they take up?

Objected to.

Mr. Burlingham: If he knows.

The Court: He may answer if he knows of his own knowledge.

Q. Answer in Italian.

A. The second day they took two off.

Q. On which side?

A. Both sides, one on each side.

Q. How many limber boards are movable, how many can be taken up easily?

A. You sould take off three or four.

Q. And what is the width of these boards?

A. About twelve or fourteen inches.

Q. And how long are they?

A. I couldn't tell exactly, because there is different lengths; there is ten, twelve and fifteen feet long, so I can't tell.

Q. How many widths of boards were removable?

A. Four or five.

Q. When the movable limber boards were taken up could you see the condition of the cement underneath; do you understand?

A. Yes, sir.

Q. Now, answer in Italian.

A. Yes, sir.

Q. Did you yourself examine the cement at any time, either the first or the second day?

A. I did not examine it the first day, but I did on the second day, because I received an order from Captain Connell to see if the cement was in good condition.

Q. What was the extent of your examination; how much did you examine?

A. On the second day I was there I examined all the

87 cement, some I did personally, some my foreman did; those places where I could not go I sent my foreman.

Q. I don't want to know what your foreman reported to you, I want to know what you saw yourself and where you saw it?

W. What I saw was all right.

Q. And where did you see it?

A. The following day.

Q. In what part of the ship?

A. From the ballast to the bulkhead of the cofferdam.

Q. You said this morning that your men put cement on; how do they put the cement on; is it in liquid form?
A. The cement is mixed up with sand and water.
Q. What proportion of sand and water?
A. One-half cement and one-half sand.
Q. And is it in liquid form, nearly, like a paste?
A. Nearly liquid, like a paste.
Q. Does that adhere to the iron of the ship; does it stick to the iron of the ship?
A. Yes.
Q. Can water get in between the skin of the ship?
A. When the cement is laid on right no water can get between.
Q. How soon does it dry?
A. About two or three hours.
Q. What thickness do you apply in the bottom of the ship?
A. From three to three and a half inches.

Cross-examined by Mr. Kneeland:

Q. On the first day you went there, where did you find the ballast, how far forward did you find it?
A. In the afterpart of the boat, near the bulkhead.
Q. Near what bulkhead?
A. Afterpeak bulkhead.
Q. How far forward of the afterpeak bulkhead did that ballast come?
A. I could not say exactly, but it was about fourteen or twenty feet.
88 Q. Didn't the ballast extend almost to the afterhatch?
A. About ten feet distant, not exactly.
Q. How long were you there the first day?
A. About half an hour.
Q. And the second day, when you went there in the morning, how long did you stay?
A. Two hours.
Q. And in the afternoon how long, or evening?
A. From half-past 4 to 5; that was time enough for me to see how the cement was.
Q. Was the work finished when you left?
A. Five o'clock.
Q. The work was finished at 5 o'clock?
A. There was to put back the limber boards.
Q. How many boards were up when you were there in the morning?
A. Two from one end to the other.
Q. And were those boards still up in the evening?
A. (The Interpreter.) He wants to know whether it is the first or the second day you are talking about.
Q. The second day.
A. They were all off.
Q. And when were they put back?

A. The next day.
Q. Who put the ballast back?
A. Our men.
Q. Did you say that there were four or five strips of the ceiling which could be removed on the inside?
A. Yes, but we could take them off all, if we wanted to.
Q. You took up two?
A. Yes.
Q. Did you cement this vessel in June, 1912?
A. Yes, sir.
Q. How thick did you put in the cement then?
A. About four inches.
Q. Didn't you put the cement clear up to the top of the floors or frames?
A. No, sir.
Q. Did you see that work yourself?
A. Yes, sir; there was about fourteen spaces, and there were
89 already four under the ballast, this way from the bulkhead peak.
Q. They were full of what?
A. Full of cement.
Q. Did you put that cement in?
A. No, sir.
Q. Had you ever seen cement put in so thick as that before?
A. In some boats I did.

WILLIAM B. SMITH, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. You are connected with the American Bureau of Shipping?
A. Yes, sir.
Q. Which publishes the "Record?"
A. Yes, sir.
Q. How long have you been with them, Captain Smith?
A. About ten years.
Q. And have they a surveyor?
A. Yes, sir.
Q. How many surveyors have they?
A. In the port of New York?
Q. Yes.
A. Two.
Q. Who is the other one?
A. Captain Proctor.
Q. He is termed supervisor?
A. No, Mr. Stratton.
Q. Before you became a surveyor for the "Record," what was your experience; what had you been doing before that?
A. Chief engineer of the Hoboken ferries.
Q. For how long?
A. For about seven years.

Q. And before that?

A. I was working in a machine shop, assistant chief engineer of the ferry.

Q. And you have been, I suppose, thirty or forty years in that business?

A. About forty years in this business, yes, sir.

Q. As one of the surveyors for the "Record" you examine
90 a good many vessels, do you?

A. Yes, sir.

Q. For purposes of classification?

A. For purposes of classification.

Q. Was the Julia Luckenbach classified in your "Record?"

A. Yes, sir.

Q. And in 1912 what was her class?

A. Biennial survey I made on to her.

Q. What class did she hold?

A. A1 for four years.

Q. When was that class given her, in what year?

A. 1904.

Q. If you have any memorandum you can refer to it to refresh your recollection. What is the significance of A1 in your "Record?"

A. First-class.

Q. Well, I mean what does it enable such a vessel to carry in the way of cargo?

A. Any kind of cargo.

Q. Dry and perishable cargo?

A. Dry and perishable cargo.

Q. Did you survey her in 1908, did you say?

A. 1909.

Q. And did you give her that class then?

A. Yes, sir.

Q. And the "Record" issued a certificate?

A. Yes, sir.

Q. Now, under your rules when should she be examined again after 1909?

A. Well, in 1911, but she dated back one year, which made it 1912.

Q. Why?

A. Because the vessel wasn't intending to get out, so we had to wait.

Q. When did you examine her in 1912?

A. November, 1912, first-class; first class May, 1909, and February, 1912.

Q. What class did she get in February, 1912?

A. She got the same class, A1.

Q. And when was the actual survey of her just previous to granting that class?

A. 1909.

91 Q. No, no; but you examined her a few days before you granted this extension of this classification in February?

A. Yes, sir.

Q. When was it, in January?

A. No, sir; it was in February; I couldn't give you the exact date.

Q. Perhaps by referring to this survey, dated March 15th, you will be able to refresh your recollection as to the time when you saw her in dock; it says January, doesn't it?

A. It says January, yes, sir.

Q. Do you recall that that was some time just after she had had a collision with the Horatius?

A. Yes, sir.

Q. And she was at Shewan's Dock?

A. Yes, sir.

Q. And you saw her how often there?

A. Every other day.

Q. For the whole period?

A. For about a week, I think. It would be at least calculation a week.

Q. And you saw her every other day?

A. Every other day, yes, sir; and during this time I saw her every day for the first three days.

Q. And you were there not to superintend repairs or look after the damage, but to take advantage of the fact that she was on the dock to determine whether her class could be extended; is that it?

A. Yes, sir; that is it.

Q. And she had considerable repairs, did she?

A. Yes, sir.

Q. About $10,000?

A. I don't know exactly the amount.

Q. It was a serious damage, wasn't it?

A. Yes, sir.

Q. And was it largely forward?

A. Yes, sir.

Q. How many days do you think she was on the dock itself?

A. I think she was there about three days.

Q. And during those three days how often did you see her?

92 A. I saw her very near every day according to this.

Q. Did you examine her hull?

A. Oh, yes.

Q. How did you examine it?

A. By taking a hammer and tapping it different places and examining all around through her.

Q. Tell us in more detail how full your examination was; give it to us in detail.

A. Well, I went underneath the bottom of the vessel, and inside of her bottom all the way through on both sides of her; I saw the sternposts and the rudder, and wherever I found any suspicious place I would take the hammer and tap the shell, plating, to find out if it was thin.

Q. What would arouse your suspicion?

A. Show a damage spot around where the weakness would be;

for instance, a discolored rivet; you would see a leak around the edge of the rivet, and we sounded those with the hammer to see if they were rusted.

Q. Were you assisted by anyone?

A. No, sir.

Q. Did you go the whole length of the vessel?

A. Oh, yes, both sides.

Q. Confine yourself exclusively to the bottom, and about the rudder and the sternposts and the stem, and all that sort of thing? Just go on, tell us what you did.

A. I went around the bottom of the vessel and took my hammer and tapped at places to find any thin places.

Q. Did you find any?

A. I found none.

Q. Can you tell when you are tapping with a hammer whether the cement on the inside is loose?

A. No, not always.

Q. Do you think it is possible to tell from the sound in different places whether the cement is loose?

A. No, sir.

Q. Did you make any drillings?

A. No, sir.

Q. Under your rules are you required to make drillings?

A. No, sir; not unless we feel so disposed to; that is left to the surveyor entirely.

93 Q. To the discretion of the surveyor?

A. Yes, sir.

Q. Now, as the result of this examination, after the repairs were completed, I understand you gave her a class which ran how long?

A. It run for two years longer.

Q. Now, what examination did you make inside of the vessel?

A. At the time of this here hole in the vessel?

Q. Yes.

A. I went inside and made an examination of the sheet where the hole was through.

Q. Do you refer to this damage—I mean in January.

A. Went inside and lifted all the limbers, had them all lifted, and examined all the floors, and examined machinery first, and——

Q. Confine yourself to the bottom of the vessel so far as you can: did you examine the limbers?

A. Yes, sir.

Q. Did you have the boards taken up?

A. Oh, yes.

Q. Was there any ballast in her then?

A. I think not.

Q. It has been described here, I think, by Captain Bagger, that there are three limber boards about ten inches in width?

A. Each one, yes.

Q. And then further toward the wings of the vessel there is a permanent wooden ceiling; is that right?

A. Yes, sir.

Q. Was that permanent wooden ceiling taken up?
A. No, sir.
Q. Not—didn't you order it up?
A. It was all bolted down, it was part of the construction of the vessel, and we only order it up when we have our regular survey, which would have taken place in two years more.
Q. Can you tell from an inspection of the limbers anything about the condition of the cement?
A. As far as I could see, after the boards were lifted, the
94 cement was all in good condition, all through-out.
Q. Did you examine it with a view to determining that?
A. Oh, yes.
Q. Is that an important part of your examination, to see that the cement is in good condition?
A. One of the most important parts.
Q. Is the cement an important feature in a vessel?
A. It certainly is.
Q. An iron vessel?
A. Yes, sir.
Q. I suppose you agree with the others that there is always a possibility, if the cement is broken, that sugar acid will develop and damage the iron?
A. Yes.
Q. That is, I suppose, quite different with respect to steel vessels?
A. Yes, sir.

By the Court:

Q. Will it damage an iron vessel as fast as a steel vessel?
A. No, not as fast as steel.

By Mr. Burlingham:

Q. Tell us about the pumping system, the piping system of this vessel.
A. She had four suctions, two on each side of the center keelson, and two close to the cofferdam, or what they call the after bulkhead, and two-wing suctions about midway between that and the after bulkhead.
Q. First, what about their construction; what do you say as to the propriety of providing a vessel with that sort of piping and no other?
A. It is customary to do that.
Q. Did you think that it was sufficient for a ship of that kind?
A. Oh, yes, plenty.
Q. Now, one of the experts this morning has criticized it quite severely, and said there were too many elbows.
A. That may possibly be; the straighter line you can get
95 a suction pipe in the better, but in this case, where she had been running so many years with it the way it was, shows that she had done her work all right.
Q. What do you say as to the piping of that vessel compared with the piping of other vessels of the same general character?

A. I have seen vessels almost the same as she is with two or three elbows in, I have often seen it.
Q. Do you like it?
A. No.
Q. You like another system better?
A. I like a straight line better.

Adjourned until 2 o'clock.

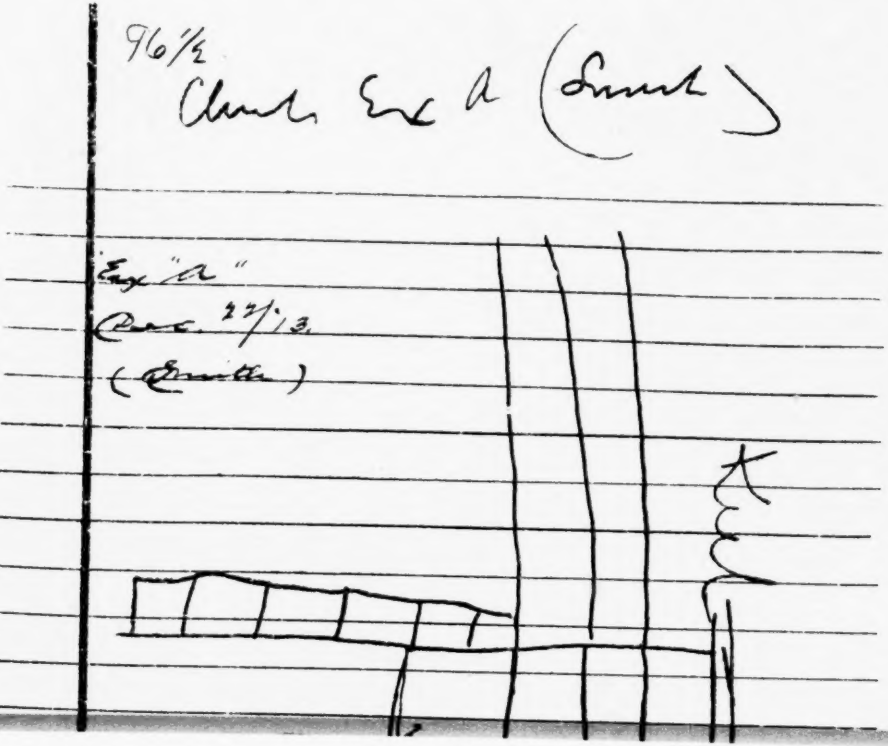
Examination of the witness WILLIAM B. SMITH continued:

By Mr. Burlingham:

Q. Familiar as you are with the piping system of the Julia Luckenbach, what do you say as to whether it is sufficient for a vessel of that class?
A. Yes, sir; it is.
Q. But, as I understand you, you would prefer a system which didn't have so many elbows?
A. Yes, I would prefer that, but it is nothing unusual to see them built that way.
Q. Did you survey the vessel after the damage?
A. Yes, sir.
Q. After this accident?
A. At this hole?
Q. Yes.
A. Oh, yes.
Q. That was only—less than four months after your survey?
A. Yes, sir.
Q. And she was on the dock then, when you saw her?
A. Yes, sir.
Q. And you examined this plate in question?
A. Oh, yes.
96 Q. Did you find it, as the witnesses this morning have said, thin at the edges?
A. Found it thin at the edges, yes, sir.
Q. To what did you attribute that?
A. It had been due to the acid of the sugar; or some other foreign substance got in there, it may have been oil or it may have been sugar.
Q. There had been a patch put on when you saw it?
A. No, sir; I recommended that to be put on.
Q. I don't mean the permanent patch.
A. No, that was off when I got there.
Q. When you got there the temporary patch which had been put on in Porto Rico had been removed?
A. Had been removed, yes, sir.
Q. What was the condition of the cement?
A. The cement was broken all the way around the hole for a radius of about ten inches.
Q. How was the rest of the cement?
A. Very good indeed, very good.

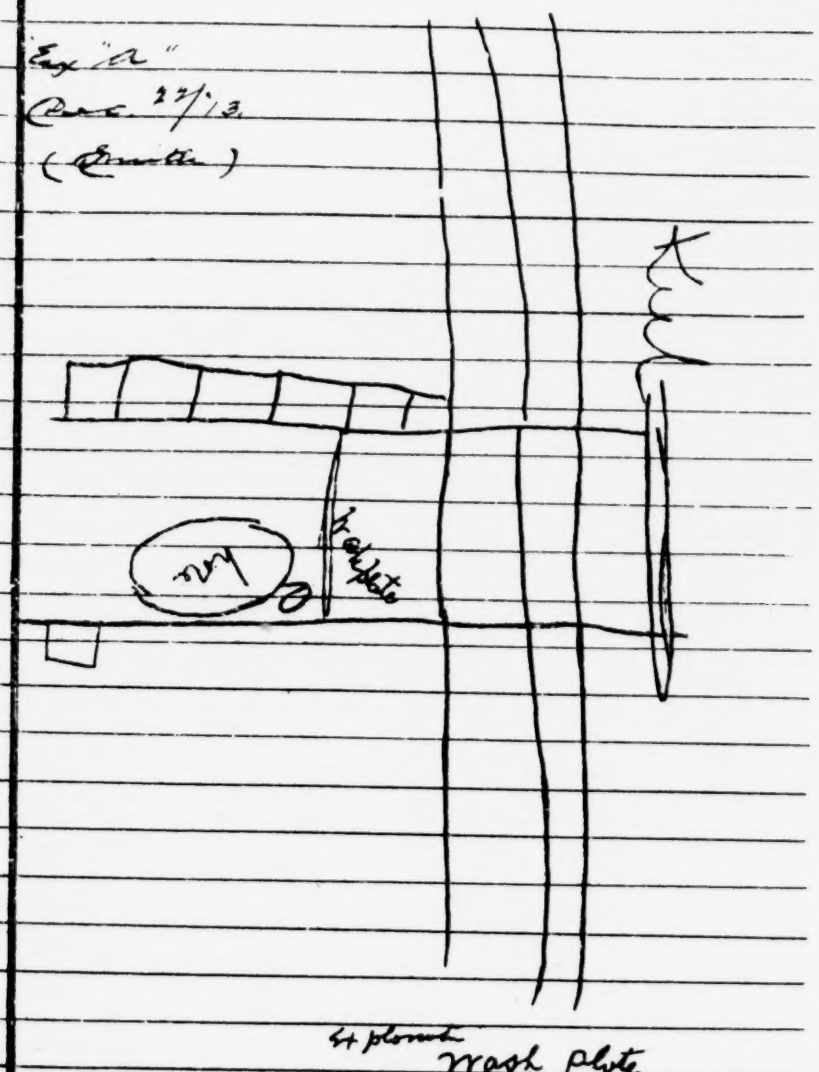
96½

Church Exc A (Lamb)



96 1/2

Clark Exc A (Smith)




No 7 1/3.
Luckenbach
McCahan Sugar
Refining Co
P 96 1/2

Q. Did you examine it from the inside?
A. Yes, sir.
Q. Had they taken off the permanent ceiling in that part?
A. Yes, sir.
Q. Even if they had not been taken off, would it have been possible through the spaces from which the limber boards were removed to see if the cement was in that place?
A. No, because it was on the other side of the wash plate, and the permanent ceiling came down from the top of the wash plate——
Q. What is a wash plate?
A. It is the same as an intercostal between two floors, it ties the floor of the vessel together.
Q. It runs fore and aft?
A. It runs fore and aft, and this hole was located right in the corner of the wash plate and the floor, so you couldn't see from the underside; you could see probably from the top side, but it was down so far it would be almost impossible to see it from the top.

(Here follows diagram marked p. 96½.)

97 Q. And how far was this hole, should you say, from the line of the keel?

A. I should say probably twelve inches—that is the permanent ceiling.

Q. I said how far was it from the line of the keel?

A. I have got it here, the line of the keel from the hole, 6 feet 4 inches from the central line of the vessel.

Q. Will you make a very rough drawing of that to show it to us with reference to this plate you speak of?

A. (Witness does so.)

Q. Where are the limber boards, indicate those.

A. (Does so.)

Q. How many were there?

A. I think there were two.

Q. Captain Bagger said three.

A. There may possibly have been three; you couldn't see on account of the wash plate being here.

Q. This hole is rather out of proportion in this drawing of yours.

A. Yes, it isn't drawn to a scale.

The diagram is offered in evidence and marked Exhibit Smith, A, of this date.

Q. What do you say as to the necessity of inspecting the cement in an old ship like this, as to the period which should be allowed to elapse between the taking up of the permanent ceiling in order to show the conditions below?

A. A ship of this age, about four years.

Cross-examined by Mr. Kreenland.

Q. Captain Smith, this examination which you made, the survey which you held in 1911 while the vessel was undergoing some repairs on account of damage——

A. 1911?

Q. Yes; is that the date you examined her, or can you recollect?

A. January, 1912.

98 Q. And the damage by that collision was forward?

A. Yes, sir.

Q. Did you see any ballast in this vessel aft on that occasion?

A. No, I did not, I had no occasion to look for anything of that kind.

Q. Is it not true in your experience that they have portions of what you call the permanent ceiling, as distinguished from the limber boards, arranged with boards loose at intervals so they can be raised?

A. No, sir.

Q. Have you ever noticed that?

A. No, sir.

Q. What means do you take then of determining whether anything has happened to the cement?

A. We generally drop an electric light down in between the floor frames and look down in there.

Q. From where?

A. From the upper edge, or the lower edge of this permanent ceiling.

Q. Did you do that on this occasion?

A. We did, yes, sir, when we made the survey on her in February.

Q. In February?

A. Yes, sir.

Q. How far did this permanent ceiling run?

A. In width?

Q. Yes.

A. Well, I should think in the neighborhood of five or six feet.

Q. And do I understand that you drop an electric light down in each of those spaces and examine that cement?

A. Yes, there is a space there of twelve inches.

Q. And nothing to prevent the light from going down?

A. Only the wash plate which I showed you on the diagram.

Q. You put that hole just outside of the wash plate, did you not?

A. Yes, sir.

Q. At the outside, I mean, away from the keel?

A. Yes, sir.

Q. Where did the side keelson come?

A. Right over the wash plates.

99 Q. And there was no other intercostal between the keel and the upper part of the vessel?

A. No, sir; no other, only one wash plate under that keelson.

Q. Do you know the history of this vessel?

A. No, I do not.

Q. Do you know what she was forme-ly?

A. No, sir; our records would show it at the office.

Q. But you have never looked her up?

A. No.

Q. You don't know that she was formerly a tank?

A. I knew she was formerly a tank, yes, sir.

Q. An oil tank?

A. An oil tank, yes, sir.

Q. In converting this vessel from an oil tank to an ordinary cargo steamer, before cementing her, it was absolutely necessary to get all the oil out of the inside?

A. As a rule they don't put oil in cement steamers.

Q. In order to convert her from oil to a dry cargo vessel it was necessary to get all the oil off?

A. It certainly is.

Q. And if in any way you have failed to get all the oil off, the cement wouldn't attach, would it?

A. Yes.

Q. Will that cause the cement to break?

A. Well, it will cause it to separate from the iron; it wouldn't cause it to break, but to separate from the iron.

Q. Isn't there any way of sounding the cement?
A. Of what?
Q. Sounding the cement by tapping?
A. No, sir; you can tap all you have a mind to, and you can't tell whether the cement is loose or not.
Q. There is no way you can tell from the outside?
A. Not unless it is very thin.
Q. And that would tell the thickness of the plate, not of the cement?
A. Yes.
100 Q. Isn't it usual to have a space in the afterhold of a vessel fifty-seven feet long without suction?
A. That is very often the case in a ship.
Q. You mean that there are fifty-seven feet in the afterpart of that hold that you can't drain?
A. Yes, sir; I have seen them more than that, I have seen them seventy-five feet.
Q. Do you think that is proper?
A. Yes.
Q. You recommended them to put an extra suction in the vessel aft?
A. No.
Q. Don't you know that there was one put in?
A. There was one put in.
Q. You didn't recommend that?
A. No, sir; she had plenty without that.

Cross-examined by Mr. Kirlin:

Q. Do I understand that when you examined the ship in January or February, 1912, the permanent ceiling in the No. 4 hold on the starboard side of the shaft tunnel had been taken up?
A. No, sir; not the permanent ceiling.
Q. Well, your examination at that time could not have extended to the location where this hole is?
A. Why, yes, we lifted the other ceiling, examined down the floors, and put a lamp-light down from the ceiling in between the skin of the vessel.
Q. You said you couldn't see through from the bilge that was uncovered without the limber boards were taken away so as to see the plate where the hole was subsequently found?
A. You couldn't see it from underneath on account of the wash plate, but you could see from the top, by an electric light.
Q. How would you put an electric light down there?
A. Attach a piece of cord to it and drop it down very easy; she was all dead rise at that point.
101 Q. Suppose you drop the electric light down there in the corner, where can you go to view the corner, to see whether the cement is there?
A. From the upper end of the permanent ceiling.
Q. From the same place you sent the light down?
A. Yes, sir.

Q. How far would your eyes be from the place where you found the hole, if you looked down from the permanent ceiling?

A. About four feet.

Q. It would be almost impossible to detect a hole that distance from the permanent ceiling. Have you ever seen the permanent ceiling up?

A. Yes, sir; when we classed her in 1909 I seen that permanent ceiling was lifted up, so we could look underneath it.

Q. Did you then examine the particular compartment, in January or February, 1910, that you found the hole in?

A. Yes, sir; in May 28th, 1912, we found the hole.

Q. In 1909 did you examine the particular compartment in which in May, 1912, you found the hole?

A. Yes, sir.

Q. Can you tell us now what was the condition of the cement there?

A. It was good.

Q. Could you tell whether it had adhered to the plate or not?

A. No, that we couldn't tell.

Q. Could you tell whether it was watertight?

A. No.

Q. Is there no way known to your bureau of determining whether the cement adheres to the plate or not?

A. The cement might be away from the plate and we couldn't detect it.

Q. Your inspection wouldn't amount to anything if you couldn't assure yourself that it was sticking to the iron?

A. All we can tell if it is broken or disturbed.

Q. It is no good being there unless you can tell the condi-
102 tion of the cement?

A. Oh, but if the cement is a little loose from the plate, we couldn't discover it.

Q. What good would it be your going there?

A. It isn't supposed to——

Q. You don't take any practical measures so far as your bureau is concerned to determine whether the cement is sticking to the iron or not?

A. No, sir.

By the Court:

Q. You spoke of tapping plates with a hammer; now, if you tap an iron plate with a hammer, would you be able to tell the difference between a half-inch iron plate properly adhering to the packing of cement, and a one-sixteenth inch iron plate properly adhering to the back of cement?

A. Yes, sir; we would know the difference, because there would be a hollow space between the plate and the cement.

Q. That isn't what I said; I can quite understand there being a hollow space between the cement and the plate, you would get a different sound—what I want to know particularly is whether you could tell the difference between a one-half inch plate properly ad-

hering to its backing of cement, and a one-sixteenth inch plate which was also properly adhering to its backing of cement?

A. No, sir; you could not.

By Mr. Burlingham:

Q. If the cement did not adhere to the plate, in the working of the vessel in seas, would it be in its pristine condition, the cement, or would it break up?

A. It is liable to break up in a heavy sea.

Q. Pretty sure to, isn't it?

A. Yes, sir.

103 By Mr. Kirlin:

Q. I understand that you tap the plates wherever you see signs of moisture; that would be to determine whether the rivets were right or not?

A. Yes, sir.

Q. Did you tap the body of the plates as distinguished from the rivets?

A. Yes, sir; tapped the rivets and the plate as well.

Q. All of them?

A. Yes, sir.

Q. All over the bottom?

A. No, only in spots where it showed any indication.

Q. Any indication you say?

A. Yes, sir.

Q. Now, what indications would there be?

A. This moisture that you would see.

Q. That moisture would be from leaking rivets, loose rivets?

A. Yes.

Q. But if there weren't loose rivets, you didn't tap the plate to find if it was thin or not?

A. That is what we tapped it for.

Q. If you didn't see any signs of moisture around the rivets, you didn't tap the plate?

A. No.

Q. So that even a thin plate wouldn't be discovered by your examination unless you found a loose rivet?

A. No, sir.

GEORGE B. DRAKE, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. Are you a naval architect?

A. Yes, sir.

Q. What degrees do you hold?

A. I hold no degrees, except practical experience.

Q. What has your experience been?

A. Shipyard experience, operating vessels, starting in Buf-

104 falo, supervising work in various yards on the coast, also in England.

Q. What shipbuilding concern have you been with?
A. With the Union Drydock, afterward the Buffalo Drydock Company, and I have been supervising work in various yards on the coast.
Q. Various yards on the Atlantic coast?
A. On the Atlantic coast.
Q. How long has your experience been?
A. Since 1890.
Q. In what employ are you now?
A. With the Texas Company at present.
Q. What capacity?
A. Assistant manager of the marine department.
Q. Have they built a good many vessels?
A. Yes, sir.
Q. Have you superintended their construction?
A. Both designed and superintended the construction.
Q. At what yards?
A. Newport News, Staten Island Ship Building Company, Boukers.
Q. In May, 1912, did you go aboard the Julia Luckenbach at Shewan's?
A. Yes, I went aboard the Julia Luckenbach at Shewan's.
Q. What did you go there to examine especially?
A. I was sent there to examine a patch on her plate.
Q. Was the patch on there?
A. Yes.
Q. The permanent patch or temporary patch?
A. The permanent patch.
Q. Did you examine the plating, or drill it, or anything of that sort?
A. I witnessed the drilling of the plating near the patch.
Q. By whom?
A. By one of the ship men.
Q. For whom?
A. For our information, I believe.
Q. What plate was it?
A. It was the plate next the garboard, about fifty-five feet from the stern.
105 Q. And where in relation to this patch?
A. Just aft of the patch, about two feet away.
Q. Was there anything to excite your suspicion before you drilled?
A. No; we drilled at random.
Q. Did the plate seem thin before you drilled, or ordinary?
A. Ordinary.
Q. How did you find the plate?
A. Found the plate to be in good condition when we drilled, and about one-half inch in thickness.
Q. How many drillings were made?
A. I only witnessed that one drilling.
Q. Was Mr. Martin there at the time?
A. Mr. Martin, yes, sir.

Q. What can you discover about the plating of a vessel by external observation and inspection?

A. Why any extreme bad condition you can usually find out by hammering the plate, unless there is heavy cement inside.

Q. If there is any cement inside, does it prevent your distinguishing between a thickness and a thinness?

A. It usually does, unless the thinness is so pronounced that the hammer goes through.

Q. The cement acts like a sort of cushion on the back?

A. Yes, sir.

Q. What is the usual method of testing the hull of vessels in examinations?

A. Either from observation or the hammering, which we often do, or in extreme cases by drilling the plate.

Q. What do you mean by observation?

A. Looking over the bottom of the ship, if there is any suspicious looking places——

Q. What are the signs or indices of suspicion?

A. Moisture on the rivets.

Q. Anything else?

A. Inequalities in the plating.

Q. And have you inspected vessels for that purpose from time to time?

A. I have, sir.

106 Q. A great many of them, I suppose?

A. A good many.

Q. Observation is one method, and another method is tapping?

A. Tapping.

Q. What sort of a hammer is it, a light hammer?

A. Usually use what you can get hold of, but usually a machinist's hammer.

Q. I don't suppose you examine every single plate in the hull of a vessel?

A. No, you don't as a rule.

Q. How is it done?

A. It is done a good deal by selecting parts of the ship which you know from experience will go first.

Q. And if I should buy a ship now, and knowing nothing about ships, should ask you to look her over and see whether her hull is in sound condition, and she is on the drydock, what would you do?

A. First I would see the general condition of the hull from observation; then I would tap or sound the plating to quite an extent; I would also make as good an internal examination as circumstances would allow.

Q. Now, let us come to the internal examination. Assuming that a ship like this had a permanent ceiling, what would you do?

A. Unless I had special orders, I would take up the limber strakes and examine the bottom as far as you could from there.

Q. As the last witness, Captain Smith, has said, the particular hole in this vessel could not be discovered from opening the limber

strakes, taking up the limber boards; do you agree with that?

A. Not entirely; if the cement was in very bad condition in the locality of that hole, we should have seen it from the distance that he named, about four feet.

Q. You think that would be entirely practical, to take up those limber boards?

A. I think so.

Q. As matter of fact, did you examine this vessel from
107 within?

A. I was both outside and inside of it.

Q. What did you do on the inside?

A. Looked over, as far as I could, the number and condition of the suction pipes.

Q. But with reference to the plating, did you do anything?

A. No, I didn't do anything in regard to the plating.

Q. Did you look down through the limbers?

A. No, I did not.

Q. Are you familiar with the construction of the ship and the lay of these limber boards.

A. Only in a very general way.

Q. You have heard this morning a description of them by Captain Bagger, that there are three boards ten inches in width which could be taken up above the limbers; and you have also heard that the hole was about six feet four inches from the line of the keel, as I understand; now, if the cement were in bad condition there and broken up, would it be possible to see that, in your opinion, by taking up the limber boards?

A. I think it would.

Q. Now, you say you looked over the piping in the ship, did you?

A. In that particular hold.

Q. That is 3 and 4?

A. Yes, sir.

Q. I think someone said it was ninety-four feet, the combined length of 3 and 4?

A. It would be about that.

Q. And did you look both on the starboard and port side?

A. Yes.

Q. Describe in a general way what the piping conditions were when you found them?

A. Two, two and a half-inch boiler suctions on each side, the after suction leading back through the shaft tunnel and out, and again leading forward to about eighteen feet from the bulkhead; the other suction was close to the forward end of the hold.

Q. This same hold?

A. This same hold, yes, sir.

108 Q. How many suctions were there in that hold?

A. Four altogether.

Q. How many did you see?

A. I saw evidence of four.

Q. And do you agree with Captain Bagger that one of the rose-boxes had disappeared?

A. The piping was undergoing repairs the day I was there, and I couldn't answer as to the condition of the rose boxes.

Q. Now, from your knowledge of inspecting the construction and your experience, and your examination of this vessel the Julia Luckenbach, will you be kind enough to tell us what you would say as to the sufficiency of the piping of this vessel?

A. I should say that she had plenty.

Q. I suppose you agree with others that the less elbows the better?

A. Oh, yes.

Q. But do you think this was sufficient?

A. I think she had quite sufficient piping.

Q. Do you think this piping system, as you saw it, and the suction, would take care of the water?

A. It should take care of the water under any ordinary conditions.

Cross-examined by Mr. Kneeland.

Q. Are you familiar with pumping—the pipes on ships?

A. Not entirely familiar with pumping.

Q. Can you or not express an opinion as to whether her pumps and suction pipes, if in good condition, were sufficient to control such a flow of water from such a hold?

A. I should say just about sufficient.

Q. Is the ceiling of a vessel of this kind supposed to be tight enough to prevent ravelling of bags getting through it?

A. It should be.

Q. If when they were pumping they found it at the time impossible to continue that pumping because they were bringing
109 up bag ravellings, would or would not that indicate to you anything insufficient or out of the way in regard to the suction?

A. It might indicate that sufficient water had got in the ship to wash up some part of the ceiling, and in that case it would permit the bagging to get into the suction.

Q. Did you have anything to do with the recommendation of what changes and repairs should be made to the ship?

A. No, sir.

Q. Do you think that a ship which has fifty-seven feet aft of aftermost suction is properly provided?

A. I don't quite ketch that.

Q. You are aware, are you not, that the after suctions in this 3 and 4 hold were fifty-seven feet forward of her after bulkhead, were they not?

A. I didn't think it was as far forward as that.

Q. It has been testified.

A. I thought it was forty feet forward; I am judging from the bulkhead, not the hatch.

Q. Is it detrimental to leave that space?

A. Not with a ship like that.

Q. As a matter of fact, the ship is trimmed by the stern when she loads?

A. With a fan-model stern of that kind she couldn't carry a great deal of water there.

Q. You paid no attention to the internal arrangements of the ship except the pumping?

A. That is all.

WILLIAM J. CONNELL, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Carter:

Q. Captain Connell, you are the port captain of the Luckenbach Steamship Line?

A. Yes, sir.

110 Q. And what time did you become port captain for them?

A. June, 1910.

Q. Before becoming port captain, you were master mariner, were you not?

A. Yes, sir.

Q. How long have you held a certificate as master?

A. Twenty-six years.

Q. And how long have you been going to sea?

A. About twenty-four years.

Q. Have you ever been master of the Julia Luckenbach?

A. Yes, sir.

Q. How long were you master of her?

A. About two years, sir.

Q. And where did you run with her as master?

A. Between New York and Porto Rico.

Q. Did you go to all the ports in Porto Rico?

A. Yes, sir.

Q. San Juan, too?

A. Went to San Juan, yes, sir.

Q. As port captain for the line, what are your duties when ships come in that require repairs to be made upon them, if any?

A. To examine the ship to see that she is in a good seaworthy condition, to see that her holds are all ready for cargo, bilges thoroughly clean, and make a report to the office as to the condition.

Q. When a ship arrives and requires any repairs, or if she comes in and you look her over and you think anything is needed to be done on that ship, do you report that to Mr. Luckenbach?

A. Yes, sir.

Q. And then what orders does he give you in regard to that work?

A. If the repairs are necessary, to have them done.

Q. He doesn't limit you to any expense, does he?

A. No, sir.

Q. After you have made an inspection and no repairs are needed to make the vessel seaworthy, do you then report to Mr.

111 Luckenbach that she is ready to receive cargo?

A. Yes, sir.

Q. Is that your usual practice?

A. Yes, sir.

Q. Captain Connell, on the Julia Luckenbach, when was the last time that you made an inspection of the steamship before this accident?

A. I think in November, 1911.

Q. And what was that inspection?

A. Oh, I went all through her holds, lifted up her limber boards, got her bilges cleaned, examined the cement, and found that she was in good condition.

Q. At that time, in November, 1911, had she any ballast in her?

A. Yes, sir.

Q. Where was that?

A. She had ballast in the afterpart of No. 2 hold, and in the afterpart of No. 4 hold.

Q. And how long did that ballast remain in her, do you know?

A. Well, that ballast was there probably seven or eight months previous to that; it appears to me it was about that time; and she had ballast in her on two different occasions when I was master of her, and then the ballast was taken out, and when it was taken out, we had an examination of her underneath the flooring, and before the ballast was put in the second time—I can't just remember the date.

Q. What was the condition of the hull then?

A. It was in good condition.

Q. And the cement; when you were master of her that was down in the lower hold; how was the condition of the cement there?

A. It was in good condition.

Q. You heard this witness, the Italian, Agro, testify in reference to what he did in November, 1911?

A. Yes, sir.

Q. And also as to April, 1911, what he did?

A. Yes, sir.

112 Q. Do you remember his being aboard of the steamship after doing work in the hold?

A. I do.

Q. And about cleaning her up?

A. Yes, sir.

Q. And about putting in cement?

A. Yes, sir.

Q. Did you see that yourself after it was completed, on each of the times, in May and November?

A. There was no cement put in on this time, they were cleaned.

Q. After they were through cleaning, this company, did you go down to look over to see the work?

A. Yes, sir.

Q. And how did you find the work they had completed?

A. Found it all clean, and the cement was in good condition.

Q. Now, Captain, in relation to these suction pipes on the steamship, what do you say about them; what was their condition while you were master of the steamer?

A. They were in good condition and sufficient to keep all the water out.

By the Court:

Q. When did you cease to be master of the Julia Luckenbach?
A. I think is was in September, 1904.

By Mr. Carter:

Q. And while you were in the Julia she was carrying sugar from different ports in Porto Rico to New York?
A. Yes, sir.
Q. And while you were master of the steamer did you ever find fault with the suction pipes not being proper for the ship?
A. No, sir.
Q. Were the rose boxes or strainers in her—were they sufficient for the steamer?

Mr. Kneeland: Objected to.

Q. How was the condition in 1912, in January, do you re-
113 member her survey in January?
A. Yes, sir; I was present at the time.
Q. Were you aboard of her?
A. Yes, sir.
Q. Did you go through her to ascertain her condition?
A. Yes, sir.
Q. What did you find her condition with reference to the suction pipes, rose boxes and strainers?
A. They were good.
Q. Did they continue that way up to the last time that she left New York, on April 13, 1912, bound for Porto Rico?
A. Yes, sir.
Q. How was her inside condition with reference to the cement, if you know?
A. It was good.

Mr. Kneeland: Objected to.

Q. What part of the ship did you see?
A. I saw all through her bilges.

By the Court:

Q. That is, you mean you took up the limber boards?
A. Yes, sir.
Q. But didn't disturb the permanent ceiling?
A. No, sir; but on one occasion, when they had a survey, we took up the permanent ceiling.
Q. How long ago was that?
A. I think that was in 1909.
Q. So far as you know, has the permanent ceiling on the Julia Luckenbach been disturbed or displaced since 1909, so far as you know, of your own knowledge?
A. Well, yes, after this accident it was.
Q. You mean after the injury to the sugar?
A. Yes, sir.

Q. Which gave rise to this suit?
A. Yes, sir.
Q. But not before prior to 1909?
A. No, sir; not all the plank.

114 By Mr. Carter:

Q. Was there anything done with that permanent ceiling in 1910 or 1911, that you remember?

A. No, I don't remember anything doing to it, the planks on the outside; there is a plank on the outside of the skin, it was taken up, but not of the entire ceiling.

Q. Well, by removing the limber——

A. There is two planks under the shaft, and one plank all round the outside of it.

Q. And were you then able to see with an electric light in the No. 4 hatch?

A. Yes, sir.
Q. And did you see it at that time?
A. Yes, sir.
Q. And what was its condition?
A. Good condition.

Q. Were you present at the time she returned back in May, when she met with the accident?

A. No, sir.
Q. What time did you see her condition?
A. After the repairs had been made, just before she went to sea.

Q. While running to Porto Rico did you ever have occasion to go with the Julia to the Quartermaster's Dock?

A. Yes, sir.
Q. How many times did you go there?
A. Oh, I don't know probably fifteen or twenty times.

Q. With about what draught would you come out of there without touching?

A. Twenty-one feet six, without touching.
Q. Was that the best?
A. That was the best, yes, sir.

Q. And how much cargo would you take out on that draught of twenty-one feet?

A. Oh, I think the Julia would take about 3,000 tons on that draught, or 3,300.

Q. Have you ever discharged cargoes at the Quartermaster's Dock?

A. Yes, sir.

115 Q. What kind?

A. General cargo; cargo of all kinds.

Q. And while discharging cargo there has any cargo fallen overboard from the slings?

A. Occasionally.
Q. What year was that?
A. I ran there in 1908-1909.

Mr. Kirlin objects to as far back as that.
**Objection sustained.**

Q. From the time that you became port captain for the line, you have, have you not, while the steamer was on the drydock, made an inspection of the outside of the vessel?

A. Yes, sir.

Q. And was there at any time, taking even from January, 1912, down to the time of her leaving New York on April 13, 1912, anything, by looking at the outside hull of the vessel—take, for instance, holds Nos. 3 and 4—to indicate from the outside that anything was wrong with the plates?

A. I could see nothing.

Q. Before painting the hull of the vessel I believe the practice is to scrape?

A. Scrape it off and then to brush it.

Q. Do you remember that she was painted in 1912, at the time the survey was made after the Horatius collision?

A. Yes, sir.

Q. Before painting the hull of the vessel did you see the plates?

A. Yes, sir.

Q. Was there anything about the plates, running from the keel up in a line with No. 3 and 4 hold, to indicate that there was anything wrong with those plates?

A. Nothing, sir.

Q. You remember that the Julia was converted from an oil tanker to a cargo steamer?

A. Yes, sir.

Q. And in doing that, what would you say—that she was
116 reconstructed in a proper manner?

A. I would say that she was.

The Court: There isn't any allegation that she wasn't.

FRED L. WORKE, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Carter:

Q. Mr. Worke, what is your position with the Luckenbach Steamship Company?

A. Superintending engineer.

Q. How long have you been with them?

A. About six years altogether.

Q. And before that what was your occupation?

A. Part of that time I spent as a chief engineer in one of their steamers, and previous to that I was an engineer on sea-going vessels.

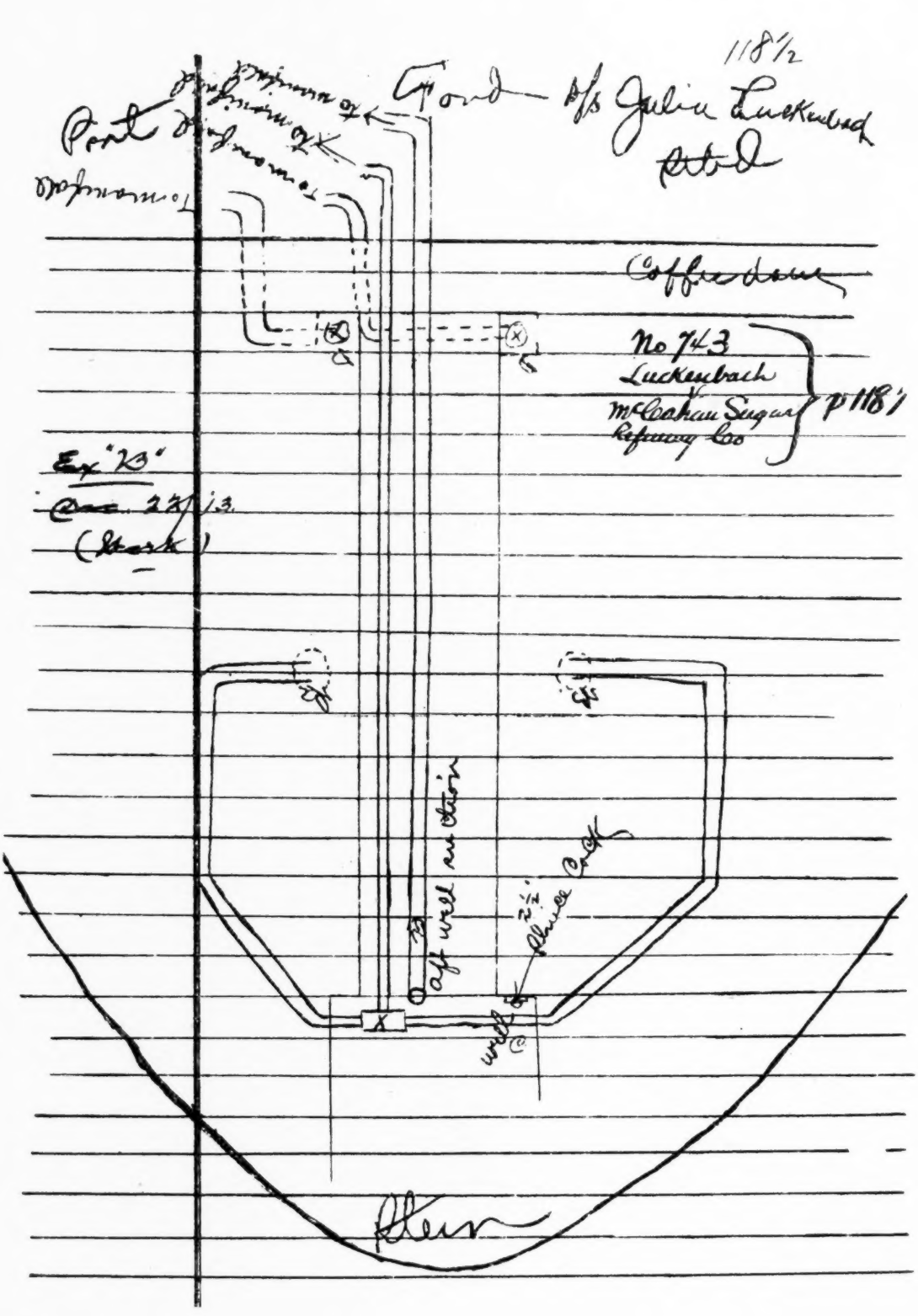
Q. Altogether how long have you been an engineer?

A. Well, connected with shipping and everything, about sixteen years.

Q. What are your duties when the steamer arrives in New York, or there is a need of repairs, or to examine her to ascertain her condition?

A. To ascertain what repairs are required by the vessel's officers and engineers; if necessary, we do that; the report having been submitted to the office of course.

Q. You report then to Mr. Luckenbach?
A. Yes, sir.
Q. What does he say to you in reference to it?
A. If he approves, they are carried out.
Q. Does he limit you to any expenditure in making those repairs complete?
A. Never as far as I know.
117 Q. After the repairs are completed, or when you look over the vessel to see whether any repairs are needed to make the vessel seaworthy, what do you then do?
A. Make as thorough an inspection of her as I can.
Q. And after you make the inspection, who do you report to?
A. Report to Mr. Luckenbach.
Q. Mr. Worke, when was the first time that you saw the steamship Julia Luckenbach, her condition in the No. 3 and 4 hold?
A. 1909, I think.
Q. And at that time what was the examination?
A. That was the time we had the permanent ceiling up for reclassification.
Q. And what did you find her condition then?
A. Her condition was good throughout the vessel.
Q. And in regard to the cement, how was that?
A. The cement was good.
Q. What do you say about the suction pipes, how were they?
A. In first-class condition.
Q. And the rose boxes and strainers?
A. All right.
Q. Were those rose boxes and strainers, as well as the suction pipe, in your opinion, sufficient for that class of a steamer?
A. More than sufficient.
Q. After 1909—from there on up to 1912, April 13, did you see the steamer every time she came in?
A. Yes, sir: at different intervals when she came in.
Q. Was there any report made to you by the engineer of the steamer that there was anything the matter with the suction pipes or the rose boxes or strainers on her arrival in New York?
A. No, sir.
Q. You remember the survey held in January, 1912, after the Horatius collision?
A. Yes, sir.
Q. You did go aboard the steamer at that time?
A. I did.
Q. Did you make an examination of the suction pipes and rose boxes and strainers.
A. Yes, sir.
118 Q. How did you find them?
A. Found them all right.
Q. Did you do anything in regard to making an examination of the No. 3 and 4 hold with reference to the cement in her?
A. We had the limber boards lifted here and there and made an examination.


118½
Ground — b/s Julius Luckenbach
Point of Diamond
Coffer dam
No 743
Luckenbach
McCahan Sugar
Refining Co
p 118½
Ex "B"
Case 23/13
(Stark)
Diamond
Diamond
Diamond

Q. And what did you find her condition when you had the limber boards taken up?

A. First-class.

Q. Do you remember this firm that Mr. Agro represents, in November 3, 1911, being aboard the steamer for the purpose of cleaning the bilges?

A. I know he was aboard of the steamer, and that he cleaned all the bilges.

Q. And after he got through with the work did you go aboard to see if it was all right?

A. I did.

Q. How did you find it?

A. All right.

Q. And what was the condition then of the cement?

A. It was all right.

Q. While she was on the drydock in 1912 being examined after the Horatius collision did you examine the outside of the vessel, the hull?

A. Yes, sir.

Q. How did you find it?

A. Good, so far as I could ascertain.

Q. Mr. Worke, I show you this paper, and ask you whether or not you made this drawing?

A. Yes, sir.

Q. And what is that drawing?

A. It is the general piping arrangement with regard to No. 3 and 4 hold.

Q. Now, will you please explain what these lines are that run parallel?

A. It means leading from the after end of the vessel to the tunnel in the engine room.

Q. And this is the suction leading to the tunnel well in the engine room?

A. Yes.

Q. That is A?

A. Yes.

(Here follows diagram marked page 118½.)

119 Q. And what is this here that I call your attention to on the diagram marked B?

A. It is the port and starboard suction.

Q. And what is this here?

A. Sluice gate, plug cock.

Q. And what are these here marked D?

A. Those are the suctions of the port and starboard side next to the covered forward end of the hold.

Q. Now, Mr. Worke, is there any trouble for the suction pipes to take the water that might accumulate in the stern?

A. I can't see it; I can't see why there should be any trouble with that arrangement.

Q. Is there such a thing aft, near the stern, as a gate, or kind of a well like where the water goes in?

A. That is what I am talking about.

The diagram is offered in evidence and marked Exhibit B of this date.

Q. Mr. Worke, you heard Captain Bagger this morning say that when he went aboard of the steamer that he found at the end of one of the pipes that there was a rose box missing. Will you please explain about that rose box?

A. Well, as I understood him, it was the starboard rose box on the forward suction of this hold; he claimed that it was off the pipe; he was quite right, it was off of the pipe, but it was laying in the bilge. The stem is made in two parts, made to fit together.

Q. How did it get in that position?

A. I couldn't say, maybe in cleaning it rope, or something of that kind, it may have separated.

Q. Now, with regard to some rope or waste or something like that, that was on one of the ends of the suction pipe that Mr. Bagger spoke of when he went down to see; could you tell from looking at that how it came there?

A. What he refers to is some of the jute rope; I take it
120 to be that; it was around the pipe, went through the ceiling which is over the rose box.

Q. And how would that get there?

A. Well, it would float there easy enough, if there was any trouble in the hold and the water was up over the skin, it would suck it down in that plate.

Q. And will you please explain to the Court, Mr. Worke, the names of the pumps that you have aboard of the Julia; what are the names of the pumps?

A. Well, the Julia had three bilge pumps——

The Court: Is there any allegation about the pumps not being sufficient?

Counsel for libelant admits that the pumps of the Julia Luckenbach were sufficient.

Q. Mr. Worke, in reference to handling the pumps and pumping water through those suction pipes, it has been testified to that

there was some choking up of the pipes when the vessel sprung a leak; is there any way that you can explain how those suction pipes could be choked up on your examination of them just prior to the voyage on April 13, 1912, when she went to Porto Rico?

A. Well, I should say that if you had several bags of sugar deep, the bagging, the sewing on the bags might burst, and it would be liable to get in the pipes, enough would go through the strainer to accumulate little by little.

Q. Is your knowledge based on your own experience?

A. Yes, as sea-going engineer, I have had several experiences of that; a vessel rolling bad in heavy weather, getting water up over the skin of the vessel, and in some cases lifting the loose ceiling, which we have for examining the boxes; as soon as that
121 is lifted it will allow any foreign matter that is there to get down in the bilge and plug up your rose box perhaps.

Q. Assuming that a vessel springs a leak, and after working at the pumps for twenty-five or thirty minutes, and then they have to stop for half an hour to three-quarters on account of the sugar and a part of the bagging being separated and coming through as they are pumping out this water, would it indicate to you from your experience as an engineer that the pumps were all right, outside of the choking caused by the sugar?

A. Oh, yes.

Q. Now, you were present, were you, at the time that the ship returned from Philadelphia to New York to go on the drydock in May, 1912?

A. Yes.

Q. And you saw this patch that was on the outside of the vessel, the temporary patch?

A. Yes.

Q. Did you see that when it was taken off?

A. I did.

Q. Did you see this hole on the outside of the plate on the starboard side?

A. Yes.

Q. Will you please explain to the Court how that hole looked?

A. Well, it was an oblong hole, I should say three-quarters by three-quarters.

Q. And what would you say in regard to the thickness right near the hole in that plate?

A. At the very edge of the hole, why it was very thin; a short distance from it it got back to the original thickness.

Q. Did you right near that hole make any examination by tapping it to find out whether the plate was in good condition?

A. Why, we tapped the plate, yes.

Q. Do you remember Mr. Martin being present, and Mr. Luckenbach, at the time?

A. Yes.

Q. Did you then bore that plate to ascertain whether or not it was defective?

A. I did.

122 Q. And after boring it what did you find out was the condition of the plate?

A. We found the original thickness of the plate, and also that the cement was closely adhering to the skin on the inside.

Q. Did you inspect the vessel as to what her condition was in regard to where this hole was?

A. Yes, sir, I did.

Q. And what did you see then in reference to the hole?

A. For a radius of about twelve inches around that hole the plate was reduced from the point of the hole up to the original thickness of the plate.

Q. And could you see any cement there?

A. No, the cement was broken around the plate.

Q. How much from the hole?

Objected to.

By the Court:

Q. Did you see the vessel at San Juan?

A. No, sir.

Q. You saw her after she arrived at New York?

A. I saw her at the dry dock.

Q. She had brought what was left of her cargo from San Juan on to Philadelphia and there discharged it?

A. Yes, sir.

Q. When you first looked at the hull it had received temporary repairs?

A. Yes.

Q. Do you know whether those temporary repairs included recementing or additional cementing?

A. I don't believe there was any cement put on there at all.

Q. Do you know it?

A. Well, it wasn't there; if it was put on it washed away.

Q. When you first saw the wound was there any cement around the patch on the inside?

A. Not within a radius of 10 or 12 inches.

123 Q. Do you know how or under what circumstances it had been removed within that radius?

A. No, I do not.

By Mr. Carter:

Q. Could you tell, Mr. Work, by looking at that hole, after that temporary patch was placed on the vessel, how that hole was caused in the side of that ship?

A. No, I could not, unless she struck something, or rested on something.

Q. How did that hole appear to your eye when you looked at it, as to how it was made?

A. Well, I couldn't tell as to that, because there was a plate outside and a washer inside, or a washer outside and a plate inside;

it would be pretty hard to tell; the surface was smooth on the outside.

Q. Would that indicate, in your experience, whether it was from the inside or the outside?

A. Well, I should say it started from the outside.

Q. In reference to this defect in the shell plating, was that observable to the eye by looking at it—could you see that when the ship sailed in April, 1912; could you see any defect in the vessel?

A. Why, no.

Cross-examined by Mr. Kneeland:

Q. This sluice cock; is that connected with the after well?

A. It is connected with the after well on the shaft.

Q. Is that open or closed?

A. It is so that it can be open; it is a cock with a plug on the top, so that it can be opened or closed.

Q. Is it ordinarily kept open or closed?

A. Why ordinarily it would be kept closed.

Q. Can you reach that?

A. Have a socket for reaching it.

124 Q. Can you tell me from which side of the shaft alley does the shaft run?

A. The shaft is a little more to the port side.

Q. So that the shaft alley isn't directly amidships?

A. Well, hardly, no; well, I couldn't say, I didn't measure it; no, it is not, because the shaft is amidships, and the shaft alley is a little on one side.

Q. The shaft alley is more to the port side?

A. No, it is more to the starboard side.

Q. It is more to the port side of the wheel than to the starboard side?

A. The shaft alley, yes; the shaft is right in the center of the ship; I won't say in this ship it is absolutely in the center, but that is the usual arrangement.

Q. Do you remember the repairs that were made after this accident?

A. No, sir.

Q. You knew there was another suction pipe, and additional suctions were installed at No. 4, did you not?

A. Yes, at the request of the charter people.

Q. Now, why was it, if you know, that they filled in the upper part of that ship with cement, up to the tops of the floors?

A. I will tell you—that steamer required a certain amount of ballast in the stern of her, and the ballast in the stern is arranged for general cargo, so that the frames were filled in up to the top of the floors so it gives her as much ballast; but it gives her more space for the cargo.

Q. That is the reason why it was put in so unusually thick?

A. Yes.

Q. Do you know when that ballast was put in the ship last?

A. That ballast I think was put in the ship in the summer of

1911; I know the ballast was changed several times.

Q. And it extended from the after-peak bulkhead almost up to the after-coamings of the No. 4 hatch?

A. Very near that far, yes.

125 Q. And right straight across the ship from the sides of the shaft alley out?

A. Yes; it was boxed in on either wing of the shaft alley.

Q. And sort of a low bulkhead went across in front of it?

A. Yes, there was a bulkhead across the forward end of it.

Q. And how high was that?

A. I should say about four feet.

Q. A four-foot bulkhead running in front of this ballast?

A. Yes, about three feet six.

Q. And the bulkhead was on top of the ceiling?

A. Yes.

Q. And when you wanted to raise the limber boards how did you get at it?

A. Why, we got at them under the tunnel.

Q. Wasn't the ballast on top of the limber boards?

A. The ballast was on top of the ceiling at the side of the tunnel.

Q. Where are these movable limber boards?

A. There are two sets of them, a set on either side of the keelson and a set outboard in the wing.

Q. That is away on the outer end?

A. About two-thirds of the way.

Q. And the others are under the shaft alley, did I understand?

A. The shaft alley stands up a little from the ceiling and forms as sort of pocket under there, and the boards are along under there.

Q. And the ballast tank goes right up against the shaft alley?

A. The ballast on each side is up against the shaft alley.

Q. So that you don't have to move that ballast to get there?

A. I think one limber board extended under that portion of the ballast.

Q. Did you hear Mr. Agro testify?

A. Why, yes, I heard him testify.

Q. It isn't true that you had to move the ballast off one of these limber boards and then move it off the other?

126 A. Well, I think there was one of the limber boards extended under the ballast.

Q. You mean one whole length?

A. No, not one whole length.

Q. One whole board?

A. Portion of one board.

Cross-examined by Mr. Kirlin:

Q. At what height is this sluice cock C on the diagram, Exhibit B, above the bottom plating of the ship?

A. I should say it was about six inches.

Q. That would be two or three inches above the top of the cement?

A. Something like that, yes.

Q. Well, now, if that cock was left open any water that might

accumulate in the starboard bilge would run right back into the after well, would it?

A. The after well of the tunnel.

Q. As I understand there are several suctions leading to that well?

A. Yes.

Q. What size are they?

A. Two and a half inches.

Q. Do you know what orders are given as to how that sluice cock should be treated on board?

A. The sluice cock on board a ship doesn't require orders.

Q. Wouldn't it be natural to leave that open so the water would run into the after well?

A. Not necessarily.

Q. Whereabouts was the hole with reference to the point you have indicated here as the rose of the starboard suction; you have marked Rose Box in that starboard suction?

A. I didn't draw this to scale at all; the hole is just forward of the forward end of No. 4 hatch.

Q. Whereabuts was it from that rose, wherever that rose was?

A. That hole would be aft of the suction.

127 Q. How far aft of where the rose box is?

A. About six feet.

Q. Did the rose box come into the same compartment or pocket in which the hole was?

A. No.

Q. Did it come into an adjacent pocket?

A. Well, it came in right close to there, four or six feet, or something like that.

By Mr. Burlingham:

Q. You heard Mr. Connell testify this afternoon did you?

A. Captain Connell?

Q. Yes.

A. Yes.

Q. I understood him to say that the permanent ceiling hadn't been taken up from 1909; what is your recollection about that?

A. 1909.

Q. Is that your recollection, too?

A. Yes.

Q. You said you were present at the surveys at the time of the Horatius accident; how many surveyors were there, do you remember—nine or ten?

A. I think nearly every surveyor in New York was there, who was in town.

EDGAR F. LUCKENBACH, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Carter:

Q. Mr. Luckenbach, in April, May and June, 1912, were you

one of the owners of the steamship Julia Luckenbach?
A. Yes.
Q. And how long have you been in the steamship business?
A. Twenty-five years.
Q. And you are the owner of how many steamers?
A. Twelve.
128 Q. And barges?
A. Eighteen.
Q. And steamtugs?
A. Four.
Q. You have bought and sold steamships?
A. Yes.
Q. The Julia Luckenbach—what was she originally, when you bought her?
A. Cargo ship.
Q. What had she been before you bought her?
A. Cargo ship.
Q. Wasn't she an oil tanker?
A. No.
Q. She had been converted from an oil tanker into a cargo steamer?
A. After we bought her.
Q. Did you convert her from an oil tanker into a cargo vessel?
A. Yes.

By the Court:

Q. When did you get the Julia?
A. 1902, I think.
Q. Did you make her into an oil tanker at once?
A. Yes, sir.
Q. How long did she remain an oil tanker?
A. Six or seven months.
Q. What did you do with her then?
A. Reconverted her into a cargo ship.
Q. And she has been ever since that time what she is now?
A. Yes, sir.

By Mr. Carter:

Q. And has she carried cargoes of sugar?
A. Yes.
Q. Frequently?
A. Yes.
Q. She was chartered to the Insular Line in 1912?
A. Yes.
Q. And before that?
A. Yes.
Q. Is she still chartered to the Insular Line?
A. No.

129 Q. Mr. Luckenbach, when a steamship comes into dock needing repairs, or to look over her for to ascertain her condition before proceeding to sea again, who is it that has charge

of looking after the steamer?

A. Captain Connell and Mr. Work.

Q. And what orders do you give them with reference to making repairs on your steamers, when they need them?

A. To keep them up in the best possible condition.

Q. Do you have anything to do with superintending the repairs?

A. No.

Q. Who do you place that authority in, to look after the repairs of the ship?

A. Captain Connell and Mr. Work.

Q. And also to see that she is in a seaworthy condition?

A. Yes.

Q. After repairs are made on the vessel, or she is ready to load cargo, do you first get a report from them that she is in good condition?

A. Yes.

Q. And then you put her on the berth to load?

A. Yes.

Q. Were you on the steamer Julia Luckenbach at the time she left New York on April 13, 1912?

A. No.

Q. Were you on board of her at the time in San Juan when she started to load?

A. No.

Q. Were you on her when she left for Maricebo bound to Philadelphia?

A. No.

Q. Do you remember about the steamer being in collision with the steamer Horatius?

A. Yes.

Q. And being hauled up on the dry dock for repairs?

A. Yes.

Q. Will you please look at the paper I show you and see if you can refresh your recollection as to the surveyors that were on that survey?

A. Yes.

Q. How many are there?

A. Nine without my men.

Q. Ten, including yours?

A. Eleven.

130 Q. And did they all examine her?

A. Yes.

Q. And in what condition did they find her?

Mr. Kneeland objects.

A. I didn't hear any objection to her.

Q. Were you there at the time?

A. Yes.

Q. Do you remember the time that she came back from Philadelphia to New York on May 26th?

A. Yes.

Q. And do you remember June 8th, when the survey was held over there in Brooklyn?

A. Yes.

Q. And do you remember who was present at the time?

A. Yes.

Q. Remember Mr. Martin?

A. Yes.

Q. And Mr. Worke?

A. Yes.

Q. And yourself?

A. Yes.

Q. Do you remember making any examination of the plates near this hold?

A. Yes.

Q. What kind of an examination was made?

A. Mr. Martin picked up a dog from the dock and tapped a plate in the vicinity of the hole there and says "There is a thin one." "All right," I said, "let us drill it"; and he says, "Isn't that funny, I thought I could designate whether that was thin or not"; and we drilled it and it was the full thickness of the plate.

Q. Mr. Luckenbach, in April and May, 1912, when she went on this voyage from New York to Porto Rico and met with this accident, what was the market value of your steamer, on May 26th, at the end of her voyage, 1912?

A. Sixty thousand dollars.

Q. At the time of the Horatius collision do you remember that repairs were made on the steamer?

A. Yes, sir.

Q. How much did you expend on them, do you know?

131 The Court: What has that got to do with this case?

Mr. Carter: I want to show that they didn't send her to sea in bad condition.

The Court: There is no allegation that she was sent to sea in bad condition, except as to one item; no one says she wasn't in good condition.

Cross-examined by Mr. Kirlin:

Q. Is that a copy of the charter party under which she was trading at the time this accident occurred (showing witness paper)?

A. Yes.

The charter party is offered in evidence and marked Exhibit C, of this date.

By Mr. Kneeland:

Q. Mr. Luckenbach, do you remember on the 7th of June Captain Bagger and a number of other surveyors having a commission to examine your vessel, the Julia Luckenbach, before the permanent repairs on her had been completed, applied to you for permission to go aboard?

A. Yes.

Q. Did you refuse them?
A. Yes.
Q. Why did you refuse them?
A. Interfering with the work; I didn't see any necessity of having them there.
Q. You knew they were interested and wanted to find out what her condition was before you fixed her up?
A. I did not.
Q. Did they say anything to indicate that?
A. They said they were down there for survey.
Q. And you did not allow them to go aboard until you had made all the repairs and fixed things up?
132 A. Not until we were ready for them, and then we notified them.

By Mr. Carter:

Q. They had been there before, had they not?
A. Yes.
Q. And had they not to your own knowledge two or three times?
A. I wouldn't say how many times they had been there before.
Q. And there were lots of others supposed to be surveyors coming down trying to get aboard?
A. There seemed to be a continuous performance down there for about a week.
Q. So until you were ready to hold a survey in the regular way you prohibited anybody from going on the vessel?
A. I did.

By the Court:

Q. You got a little tired of the procession?
A. I did; one man went aboard in Philadelphia and said he represented the owner of the vessel.

By Mr. Carter:

Q. Do you know who that man was?
A. They told me it was Captain Bagger.

By Mr. Kneeland:

Q. You received a request to take up all the ceiling so they could examine the bottom of the ship?
A. I don't remember that.
Q. Didn't they write you such a letter?
A. I couldn't tell you.

The claimant offers in evidence the deposition of Daniel Rodick, master of the Julia Luckenbach; the deposition of Christian
133 Knudsen, chief engineer of the Julia Luckenbach, also depositions of Thomas Haley, chief officer, and George A. Little, first assistant engineer.

Mr. Carter states that every possible effort has been made to discover the carpenter of the Julia Luckenbach, without success, and

Mr. Kneeland states that he does not intend to comment upon the failure to produce the carpenter.

FRANK S. MARTIN, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. You are a marine surveyor and engineer?
A. Yes, sir.
Q. Been in business here in New York how many years?
A. Thirty-two years.
Q. You know the Julia Luckenbach?
A. I do.
Q. And you examined her in May, 1912, didn't you?
A. I examined her first on June 1st, and again on June 8th, 1912.

By the Court:

Q. Each time knowing that you were examining her with reference to this accident?
A. This accident. The first time I examined her she was afloat.

By Mr. Burlingham:

Q. Did you go down in the hold?
A. In the hold.
Q. What was the condition of the hold, what did you see.
A. The ceiling was up and they were cleaning the bilges and overhauling the bilge pipes.

134 By the Court:

Q. At whose instance did you go each time?
A. Mr. Luckenbach asked me to go down and take a look at her.

By Mr. Burlingham:

Q. Just tell us all that you discovered there.

Adjourned until to-morrow, December 23rd, 1913, at 10.30 o'clock.

NEW YORK, December 23, 1913.

Met pursuant to adjournment, as before.

FRANK S. MARTIN, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. I think you said that you visited the Julia Luckenbach twice, once on June 1st, when she was afloat, and once on June 8th, when she was on the dock; is that right?
A. That is correct.
Q. Tell us what examination you made of her, and what condition you found her in on June 1st?

A. Mr. Luckenbach asked me to attend the survey that was going to be held in the after hold of the vessel when she was at Shewan's, on the 1st of June, and I found then, together with the other surveyors, that the larger part of all the ceiling in the hold had been lifted.

Q. Do you mean the permanent ceiling?

A. I mean the permanent ceiling; and the bilges were being cleaned, and the limbers were being cleaned and the strainers
135 were being cleaned. I then looked at the arrangement of the piping.

Q. Tell us about that; what it was, very briefly; and then tell us what you think about the property and sufficiency of that sort of construction?

A. I found on the starboard side of the fore end of No. 2 hold, a 2½-inch suction pipe close to the center line; and just aft of the engineroom bulkhead on the starboard side, 7 feet 8 inches from the tunnel and 36 feet from the engineroom bulkhead at the fore end of the hold and 23 feet from the fore end of the permanent ballast, another suction. I found a suction pipe at the after end of the tunnel, 8 feet 6 inches from the after bulkhead, which would be the after peak bulkhead, a strainer at the end of the pipe.

On the port side at the fore end of the hold, next to the engineroom bulkhead, was another suction with a round strainer. At the center, 8 feet 9 inches from the tunnel and 36 feet from the bulkhead at the fore end of the hold, and 18 feet from the permanent ballast at the after end of the hold, was another suction. At the end of the tunnel was a cock leading into the well for a suction there, with round strainers on all but the forward starboard suction. A square strainer was under this pipe, but was not on the pipe, but lying alongside of it?

Q. You took notice at the time, did you?

A. I did.

Q. You have a little memorandum?

A. Yes, sir. A square strainer, not in place, but set close to the pipe——

Q. You are refreshing your recollection from a memorandum made by you at the time?

A. Yes, sir.

Q. And your notes do refresh your recollection?

A. They do.

136 Q. How thorough was your examination? It seems to be complete as far as the piping goes: was there anything more about the piping?

A. Nothing; but about the pumps——

Q. I want to finish with the piping. Some criticism has been made with regard to the distance of the after suction from the after end of the ship. Will you speak of that now?

A. The piping—the arrangement of the piping is according to the Record Rules, Lloyds Rules, and the British Corporation Rules, which provide that in flat bottomed vessels you shall have three suctions at

the after end of the hold; in a vessel of large rise of floor one suction is sufficient.

Q. What sort of a vessel is this?

A. Very sharp, making the after part of the vessel very narrow next to the after peak bulkhead.

Q. Then, as I understand it, you regard that as sufficient?

A. Ample.

Q. In accordance with the rules of the Societies?

A. In accordance with all the rules that I have seen.

Q. Did you also examine the pumping?

A. I also examined the pump system and found that she had a duplex Worthington pump 10 by 7 by 10 inches, with a capacity of about 300 gallons a minute, at slow speed; a simplex Blake pump 14 by 8 by 12, with a capacity of 260 gallons a minute, and a duplex Blake pump 6 by 5¾ by 6 inches, of about 150 gallons capacity per minute.

Q. What do you say as to the sufficiency of those pumps?

A. Ample; equal to about 800 gallons at slow speed, per minute.

Q. Have you had experience as to the choking of the pumps by sugar where water gets in the hold?

A. A great many times.

Q. Will centrifugal sugar cake and choke the pipes?

A. Yes; so that we have to dig it out; cut the pipes and
137 dig them out and clean them, and sometimes put in new pieces of pipe.

Q. When you got there the first of June was there still any sugar in the limbers?

A. There was a quantity of sugar lying along the side of the tunnel where they had taken up the ceiling, and it had gone down in between the tunnel side and the ceiling.

Q. Did you on that occasion make any examination of the plates?

A. Only to look on the inside to see where the hole had been.

Q. Had it been repaired?

A. It had been repaired June 1st.

Q. You mean it had been permanently repaired?

A. It had been permanently repaired.

Q. With a permanent patch?

A. With a permanent patch.

Q. Several feet square?

A. Subsequently I found it was about two feet square.

Q. Was there any cement over it then?

A. No; they were overhauling the cement and cleaning the floor frames and recementing, or getting ready to recement wherever it was needed.

Q. You didn't see the 4-inch patch, the temporary patch?

A. No, sir, I never saw that.

Q. The method, as described, was to put a little plate on the outside and another on the inside with a gasket of rubber between, and put a bolt through and fasten it?

A. That is a good temporary repair.

Q. Do you need cement in such circumstances?

A. I don't think it is necessary.

Q. What further examination, if any, did you make of the plating system, on that day?

A. Only to look at the place where they said this hole had been, and I saw that the plate where the hole had been was more or less wasted around this hole.

138 Q. You mean a portion of the plate had been taken off?

A. No.

Q. How could you see it if it was patched?

A. The patch was on the outside.

Q. Describe its condition?

A. The plate was wasted for an area of about—well, I should say about ten inches by twelve inches, shelving down to a very thin spot where the hole had been.

Q. Was there any cement there then?

A. No, there was no cement there.

Q. How near was there any cement?

A. The cement was close to it; they had broken some out where they had driven the rivets through that secured the permanent patch at the outside of the plate.

Q. Where was the hole?

A. The hole was in one plate in B strake, 55 feet from the propeller post, the stern post, and it had been covered with a plate——

Q. Starboard side?

A. Starboard side—2 feet long by 2 feet 2½ inches wide.

Q. How far do you make it from the keel?

A. About seven feet on a straight line.

Q. Where was it with reference to the limbers?

A. It was right in—the hole was between, or close to a frame; between the floors of the vessel, but close to the frame, and close to what has been described as the wash plate, which is really the bilge keelson with a plate acting as a wash plate.

Q. What is that wash plate for?

A. It is to prevent the water from washing back and forth in the bilges.

Q. I think Captain Bagger said there were three movable planks of ten inches?

A. The planking had all been removed, and I couldn't answer that.

Q. Why did you go again on the 8th of June?

A. Mr. Luckenbach wanted me to see the permanent re-

139 pairs that had been made, and I found that the plate, as described, riveted to this plate in which the hole had been, the plate was half an inch thick, and secured with thirty-one rivets. I then examined the bottom of the vessel, went around under the bottom of the vessel with Mr. Luckenbach and Mr. Drake. I took up a carpenter's dog, which is a piece of iron three-quarters of an inch square, turned at the ends, and about fifteen inches long.

Q. Like one of those tacks (illustrating)?

A. Yes, only longer; and I used that as a hammer, and sounded the plate here and there. In the vicinity of this patch I sounded the plate and I made the remark that it sounded hollow; and I suggested that the plate be drilled. We drilled that plating twenty-four inches from the hole that had been covered by the patch, and the plate was half an inch thick at this drilling.

Q. Was that within the region that seemed to you, from the inside, thin?

A. A little outside of that region; but twenty-four inches from that hole, within about ten inches of the wasted portion of the plate.

Q. Then your tapping wasn't a true test, was it?

A. It was not.

Q. Have you had that experience before?

A. Yes, a great many times.

Q. What is the proper and best way to ascertain the condition of the plates?

A. If the vessel is built with very light plating, like a yacht, and is cemented, you can tell sometimes whether the cement is loose by hammering; but on a heavily plated vessel the safest and best test is drilling.

Q. Are there any rules about this matter? Are you familiar with the rules of all the associations which classify ships?

A. I am.

140 Q. Lloyds, Bureau Veritas, American Record, etc.?

A. Yes, sir.

Q. I suppose you have to consult them every day, don't you?

A. I am the chief surveyor for the British Corporation in this country.

Q. What is that? Is it similar to Lloyds?

A. It is a larger classification bureau; we made Lloyds change their rules.

Q. You are familiar with all the rules?

A. I am.

Q. Are there any rules with regard to the testing of plates?

A. Yes.

Q. Will you state generally what the practice of surveyors is, and then you can refer to the rules, if you care to?

A. The practice is—if by testing with a hammer the test doesn't appear to be satisfactory, the practice is to drill the plating at least one hole in each plate, not less than five or six plates in a strake, where you would know from experience that the wasting takes place first, in places like the tanks, in the fore peak tank and the after peak tank and in the coal bunkers. But if you examine on the inside and you find the cement solid and in good condition there is no necessity for drilling there.

Q. What are the appearances that excite the suspicions of well-regulated surveyors in making these tests?

A. The condition of the cement on the inside would be—after the hold, or the spaces between the floors, have been cleaned and swept out and the cement shows that it is cracked inside of the floors, that would be an indication that the cement was loose from

the plate; and then, if you hit it with a hammer, you soon demonstrate that it is loose, because it will crack.

Q. There was a difference between witnesses here yesterday as I recall it. What is your opinion as to whether one can ascer-
141 tain from the outside whether the cement is loose or not?

A. In some cases you can, like on a light-built ship you could; but a heavily plated vessel it would be a very difficult thing to do by hammering.

Q. How about a vessel like this?

A. I don't think you would be able to do it at all.

Q. Practically, how are surveyors to determine the condition of plates without taking out the permanent ceiling and examining the spaces throughout the whole ship?

A. By lifting certain sections of the planking in the ceiling which are put there for that purpose; the limber boards.

Q. In the wings?

A. In the wings; and taking a lamp or electric light and passing it under; and sometimes you can crawl under there; there is sufficient room to crawl all the way under there.

Q. But in these surveys that are held, either periodical or damage surveys, it is the practice of surveyors to examine every space in the ship?

A. No; you examine a certain number of places, and if you find the general condition good you assume that the rest of it is in accord with that. From your experience you know where to look for the bad spots.

Q. In January, 1912, after an accident with the Horatius there were nine surveyors on board that boat; they examined her and found no criticism of the condition of the boat. What is the thorough and proper way for an owner to determine whether the plates of his vessel are in good order?

A. Lloyds surveyors have instructions to examine the plating and cementing and frames, as described.

Q. The surveyor for the American Record said yesterday that, according to their rules, once in four years they took up the permanent ceiling of a vessel constructed like this. What are the rules of other surveyors?

142 A. The British Corporation and Bureau Veritas require that when a vessel is four years old you lift a section of the ceiling; when she is eight years old you lift the same section, and when she is twelve years old you lift all the ceilings; every four years after that you lift all the ceilings.

Q. As I understand, the system is cumulative; according to Lloyds Rules, when a vessel is four years old you do certain things, and when she is eight years old you do all those things and certain others, and when she is twelve years old you do all those things and certain others, and from that time on you do everything that is required in the Rules?

A. Yes; and when a vessel is twenty years old you practically rip out everything inside and look at it.

Q. This vessel was nearly thirty years old at the time of this ex-

amination. Will you read from the American Record, just for our convenience, the record of the Julia Luckenbach?

A. She was built in May in 1882; 1,977 tons net, 3,100 tons gross; she has compound engines, two boilers; large repairs in May, 1909.

Q. Give her previous name.

A. She was formerly the steamer Zaandam, and then the steamship Styria. Large repairs in May, 1909; new shaft in March, 1910; docked and surveyed in November, 1911, a special survey was held in May, 1909; special periodical survey. She was classed A-1 for five years from November, 1908, which expires this year.

Q. I show you Lloyds Rules. Will you kindly point out the rule with regard to periodical surveys, especially with regard to taking up ceilings, if there is anything there?

A. On special survey, No. 1, which is when the vessel is four years old, the limber boards and ceilings equal to not less than
143 two strakes fore and aft on each side are to be removed, one such strake being taken from the bilges. When the ceiling on the flat of the bottom is fitted in hatches the whole of the hatches and one strake of ceiling of the bilges are to be removed. At the second and subsequent special surveys, No. 1, additional ceiling is to be lifted at other parts of the vessel where deemed necessary by the surveyors. Special survey No. 2, when the vessel is eight years old, the limber boards and ceiling equal to not less than three strakes fore and aft on each side are to be removed and one strake being taken from the bilges. In cases where the inner surface of the bottom plating is coated with cement or asphalt, the removal of this coating may be dispensed with provided it be carefully tested by beating or tapping, or found sound and adhering satisfactorily to the steel. When vessels are twelve or more years old all the ceiling has to be lifted; the plating in way of cement in the bottom need not be drilled provided the cement be found to adhere satisfactorily to the plating, and the surveyor considers drilling at this part unnecessary.

Q. I understand from your testimony and from the rules that you have read that a permanent ceiling need not be taken up more than once in four years, according to the regulations of Lloyds, the British Association and other associations?

A. Until after the vessel is twelve years old.

Q. Then it must be done every four years?

A. Then it must be done every four years.

Q. How can one determine the condition of the cement underneath a permanent ceiling, which is not to be taken up more than once in four years, according to your testimony and the Rules?

A. By lifting the loose hatches and limber boards and
144 planks that are in the ceiling for that particular purpose.

Q. How is this cement prepared?

A. Three parts sand and two parts cement, or half and half.

Q. How long will good cement last?

A. Forever, if properly applied. I have seen it when the plates have been taken off the bottom of the ship twenty years old, or more, fast and hard.

Q. But you say there is no way to actually determine on a vessel, with plates half an inch thick, whether the cement is all in good order inside, or not?

A. Unless you can go around and see whether it is cracked; you can't tell by sounding, but you can by tapping and hammering on the inside.

By the Court:

Q. Hammering on the cement?

A. Hammering on the cement.

Q. How did it affect the place where the hole was? You have heard all the testimony that has been given here, and I got the impression that this particular plate was very hard to see because of the existence of the wash plate and the width of the permanent ceiling. One witness, if not two, have testified that the spot where this hole ultimately developed, could not be seen by looking up the side of the vessel, but could only be investigated by looking down from the top of the permanent ceiling. You heard that testimony?

A. Yes, sir. The hole was close, as described, to this wash plate, which was really an intercostal, and at that point the depth of the floor was very much less than it was at the center line, and you couldn't get under; you couldn't crawl under, but you would have to take up the ceiling pretty close up to it. Then if you had only one width of a plank ten inches, you could see; but if you had limberboards every two or three feet it might be difficult to see this up close to the wash plate.

By Mr. Burlingham:

Q. Is that true of a large part of that strake?

A. Yes, that applies all along there—you mean fore and aft?

Q. Yes.

A. Yes, it applies fore and aft.

By the Court:

Q. In respect of the cement, does it happen that the cement over a certain portion, that is, the area between the frames, becomes loose?

A. Yes, very often.

By Mr. Burlingham:

Q. Does it show in the limbers?

A. No; the water just lies in there; you might have a place of about two feet long and the width of the frame space, which would be about two feet, where the cement had started away or broken away from the plating, of a little water getting under there, and it lodges here.

Q. How do you find that out?

A. You can't find that out, unless it is very loose and you can discover it by hammering, hammering on the cement.

Q. You can't do that without taking up the ceiling?

A. Not without taking up the ceiling.

Q. How can it be discovered by a surveyor sent to examine the vessel?

A. You can't find it out unless you hammer or chip it out, or the cement shows some indication of being cracked.

By the Court:

Q. Have you ever known of a case in which an iron or
146 steel plate in the skin of the ship was externally fair to look upon, and the cement behind that plate, between the frame plate, or the frame, was likewise externally fair to look upon, and yet there was a hollow space that contained moisture, between the cement and the plating?

A. Yes, sir, the steamer El Monte; she was an iron vessel beautifully constructed and heavily constructed. She had a hole develop under her cement, and the cement was five inches thick over that hole, and the hole had eaten right through the plate; and the vessel was on the dock, and painted, and not a sign of anything being wrong there; the owners would every year or year and a half, take her off and paint her; then the steamer Comal of the Mallory Line had the same experience.

By Mr. Burlingham:

Q. Then under these rules how would it be possible to discover such a condition there?

A. You couldn't.

By the Court:

Q. There has been some talk here about corroding from a mixture of sea water and sugar. Have you ever had occasion to consider that?

A. Yes, sir.

Q. Do you agree that such a mixture is peculiarly destructive to iron or steel?

A. It is very destructive.

Q. Does it develop rapidly?

A. Very rapidly. The Matanzas was filled with tanks for carrying molasses, and inside of seven or eight years the tanks were almost eaten up.

By Mr. Burlingham:

Q. What do you mean by "rapidly?"

147 A. It eats very fast; much more than sea, or salt, water would eat iron or steel.

By the Court:

Q. Would it be possible that this plate of iron would be practically eaten away in a space of four years?

A. It might, yes, sir.

Q. Two years?

A. I wouldn't like to say two; but I am pretty sure it would do it in four years; I have seen it where it has eaten tanks very rapidly.

By Mr. Burlingham.

Q. What do you mean by "very rapidly"?

A. You take a steel or iron vessel, and the ordinary sea water that you would allow to accumulate in the bilges probably would run longer, fifteen or twenty years it might; but you would paint the vessel and keep her going; but whereas the molasses or sugar and water, the sugar getting wet it would eat iron or steel in, I should say, a quarter of the time.

Q. It is a combination of sugar and salt water?

A. It is a combination of sugar and salt water, which forms some kind of an acid.

Q. Do they carry sugar on the Great Lakes, where they have fresh water?

A. I suppose they do.

Cross-examined by Mr. Kneeland.

Q. You have spoken of having seen rose boxes on three of these suctions?

A. Yes, sir.

Q. On the fourth, the one on the starboard side, you found a square box alongside the pipe?

A. Yes, sir.

Q. Did you examine that?

A. I did not examine it; it was made—I only examined it in this way; it was made in halves and bolted around the pipe, if I remember correctly.

148 Q. It wasn't on at the time?

A. No.

Q. Did you handle it?

A. No.

Q. You didn't notice it specially?

A. I did not.

Q. Did it show any appearance of ever having been subjected to sea water?

A. I couldn't say.

Q. Or sugar?

A. No; I can't say that it did.

Q. All that you know is that you came there and found on that particular suction a square rose box lying in that position; whereas in all the other cases you found round rose boxes on the end of each pipe?

A. That is right.

Q. You have testified about this wash plate, which was about in the same position as the inside of the bilge keelson?

A. Yes.

Q. And that, you say, was for the purpose of preventing water from washing in the bilges?

A. Yes.

Q. On the outside of that wash plate there would naturally be at most times some water, would there not?

A. There would be water there.

Q. It would lodge there?

A. It wouldn't lodge there, because the wash plate was cut away so the water couldn't lodge there.

Q. So that the water couldn't stand there?

A. Yes.

Q. You have also spoken of the vessel being provided with portable hatches, that is, in the ceiling?

A. Yes.

Q. By that you don't mean the limber boards?

A. I mean between the center line and the bilges.

Q. Taking the limber boards, also what is generally known as the permanent ceiling where you lift every third or every fourth board in that ceiling, it runs so that it can be raised without tearing it out?

A. Not quite as many as that; you have in every third or fourth strake of your ceiling a loose board here and there in the hold, so that you can lift it.

149 Q. And that would allow you access to the cement which is under the boards on each side of it?

A. Yes.

Q. So that you could make a partial examination of the cement?

A. Yes.

Q. Did you find any such thing in this vessel?

A. When I was there the ceiling had all been lifted, or a large part of it; I couldn't tell whether there had been any there or not.

Q. But that is customary, is it?

A. Yes.

Q. In order that you can make the examination of the cement between the periodical surveys, when the whole ceiling is taken away?

A. Yes; so that you can wash the bilges out and clean them.

Q. It is perfectly possible, is it not, with those loose boards not only to make a physical examination, but to examine the cement from the inside?

A. If you have a sufficient number of planks up.

Cross-examinaed by Mr. Kirlin.

Q. How sharp was the rise in the plating at the point where the hole was? I mean the rise above the keel. In other words, at the point where the hole has been located how high would the plating be, above the plating at the keel?

A. I should think it would be over fifteen inches; fifteen or eighteen inches.

Julia Luckenbach rests.

150 United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,
against
Steamship Julia Luckenbach and Insular Line.

Depositions taken on behalf of the Luckenbach, at the office of Messrs. Burlingham, Montgomery & Beecher, No. 27 William Street, New York City, on March 29, 1913.

Appearances:

Messrs. Kneeland, Harison & Hewitt (Mr. Kneeland), for the Libelant.

Messrs. Convers & Kirlin (Mr. McGrann), for the Insular Line.

Peter S. Carter, Esq., and C. C. Burlingham, Esq., for the Julia Luckenbach.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be a taxable disbursement.

Christian Knudsen, being duly sworn and examined as a witness for the Luckenbach, testifies as follows:

By Mr. Carter:

Q. What was your position on the steamer Julia Luckenbach in the month of April, 1912?

151

A. Chief engineer.

Q. When you started from New York on April 13, 1912, for Porto Rico how long had you been on the steamer as chief engineer, if you can remember?

A. From December 14, 1911.

Q. When you left New York, and during the voyage, did you have any occasion to use the pumps on board the steamer on account of the steamer leaking?

A. No, sir.

Q. From the time you left New York on April 13, 1912, up to the time you arrived at the first port in Porto Rico did you have any occasion to use the pumps during that voyage?

A. No, sir, we didn't, but we tried the holds occasionally to see if there was any water; we tried them.

Q. What was her condition on that voyage from the time you left New York until you arrived at your first port in Porto Rico?

A. First class condition.

Mr. McGrann: Does that refer to the machinery or ship in general?

Mr. Carter: The ship in general?

Q. Were you chief engineer of the Julia Luckenbach at the time that she had that collision with the steamer Horatius in Brooklyn?

A. Yes.

Q. After that do you remember whether she was out on the dry dock being repaired?

A. Yes, she was on the dry dock.

Q. At that time did you take notice of the repairs which were being made on her?

A. Yes; I couldn't specify; we had a shaft out; we had a wheel out, and a tail end shaft out for examination.

Q. What place was it in Brooklyn?

A. 26th Street.

Q. Shewan's Dock?

A. Yes, sir.

152 Q. How long was she out there being repaired?

A. We were on the dry dock I should judge three or four days; I can't say exactly.

Q. During the time you were being repaired there did you have any occasion whatever to use any of your pumps on the steamer on account of any leaking?

A. No, sir.

Q. After you had arrived at your first port in Porto Rico and during the time you were discharging your cargo did you have any occasion to use your pumps whatever on account of any leak of the vessel?

A. No.

Q. After you had left your first port and went to your second port of discharge, while lying there did you have any occasion to use your pumps?

A. No, sir.

Q. Were your pumps in the same condition, and your strainers and rose boxes as when you left New York?

A. Yes.

Q. Can you tell the first port you went to when you arrived at Porto Rico?

A. We went to San Juan that trip; we sometimes go to San Juan first and sometimes to Ponce and other places I think, but I think we went to San Juan first that trip; I would not say positively, but I think so; the logbook will show it.

Q. Your logbook will show?

A. Yes.

By Mr. McGrann:

Q. Is that the engineer's logbook?

A. Yes.

By Mr. Carter:

Q. What is your run out, four days?

A. Five and a half.

Q. I notice in your log that you arrived at Ponce first?

A. That might be, that would be probably the first port that trip.

153 Q. Then from Ponce you went to Aguadilla?

A. Yes.

Q. Then from Aguadilla you went to San Juan?

A. Yes, you will see it there.

Q. At San Juan after you discharged your cargo and before you started to load your cargo of sugar, do you adopt a certain practice or proceeding in regard to testing your pipes and rose boxes and strainers before you start to load your cargo?

A. Yes, sir.

Q. State what that practice is, as chief engineer of the steamer?

A. The chief officer takes the carpenter with him and a couple of his men to clean up the hold and take up the planking, and he calls me and we generally examine the pipes and the connections of the bilges and see that they are all clean, and I have a first assistant engineer in the engine room to put the pumps on to find they are all clear and in good working order.

Q. Did you do it in this case before you loaded your cargo of sugar at San Juan?

A. We always do.

Q. Did you do it this time?

A. I couldn't specially say I did that time, but we always do it; we always do it.

Q. That is your custom?

A. That is our system to go through all the time when we discharge one cargo before we take another one in.

Q. Before you started to take your cargo of sugar in at San Juan did you have any notice of any leak or any defect in your pipes or rose boxes or strainers?

A. No, sir.

Q. I call your attention to this log and ask you if this is your logbook of your department?

A. Yes.

Q. Is this your signature at the bottom of each of the pages?

A. Yes.

Q. From the time that you left New York, April 13, until
154 you left Arecibo on the 27th of April?

A. Yes.

Q. Is the log in your handwriting?

A. Yes.

Q. I call your attention to the entry under date of Tuesday, April 23, on the top of the page, and also to the entry reading San Juan, April 25, and I note, too, there is an entry reading "Ship hard aground at Quartermaster's Dock while loading the last of her cargo?"

A. Yes, sir.

Q. That entry that you made at that time is correct?

A. Yes, that is correct.

Q. Your entry in the log under date of April 23 showed your steamer was at Aguadilla?

A. Yes, and it says when we left there.

Q. You left there at 10 A. M. for San Juan?

A. Yes.

Q. Your log shows April 24 you arrived at San Juan?

A. Yes, everything down there is our performance.

Q. While loading your cargo at San Juan and up to the time you [illegible] the loading of your cargo did you have any notice of any leaking of the vessel?

A. No, sir.

Q. After you loaded at San Juan your steamer went to Arecibo, did she not?

A. Yes, I think Arecibo; you will find it here.

Q. On the 26th of April you left San Juan for Arecibo?

A. Yes.

Q. Is that correct according to your log?

A. Yes.

Q. On April 26 you arrived at Arecibo?

A. Yes.

Q. From the time that you left San Juan until you arrived at Arecibo had you any notice of any leak of the steamer?

A. No.

Q. How were your pumps and strainers and rose boxes from the time you left San Juan until you arrived at Arecibo; what
155 was their condition?

A. First class.

Q. You finished loading at Arecibo, did you not?

A. Yes.

Q. While loading at Arecibo and up to the time you left was there any leak discovered by you in the ship?

A. No.

Q. Were the pipes, rose boxes or strainers any different than they were at the previous ports you had been in?

A. No.

Q. I notice by your log you left Arecibo bound for Philadelphia at 5 P. M. on the 27th?

A. Yes.

Q. You left Arecibo bound for Philadelphia?

A. Yes.

Q. After you had left Arecibo bound for Philadelphia was your attention called to any leak in the vessel?

A. Yes, sir.

Q. What time was that; will you please look at your log under date of April 28 and just read from your log?

A. "Discovered shaft alley full of water at 6.40 P. M. April 28, put the pumps on and notified the captain, stopped engines 7.39."

Q. Was that P. M. or A. M.?

A. P. M.: "Kept two pumps going on the after hold and shaft alley all night; tried pumps on the bilges;" that was the same place all the time.

Q. The entries you have just read off under date of April 28, are those in your handwriting?

A. Yes.

Q. Were they true at the time you made them?

A. Yes.

Q. And correct?
A. Yes.
Q. After discovering this leak then what did you do in regard to your pumps on board?
A. We put the pumps on that part of the ship which was full of water and kept them going all the time.
Q. Until you arrived where?
156 A. Until we arrived at San Juan, until we got the water out at San Juan.
Q. Does your log state what took place from the time you discovered the leak on April 28 up to the time you arrived back at San Juan?
A. Yes.
Q. Is the log in your handwriting?
A. Yes, sir.
Q. And you made the entries at the time?
A. Yes.
Q. And they were correct?
A. Yes, sir.
Q. And you have also the entries in your logbook you reloaded your cargo of sugar bound for Philadelphia?
A. Yes.
Q. And until you arrived at Philadelphia?
A. Yes.
Q. And discharged the cargo?
A. Yes.
Q. From the time you left Philadelphia to come to New York is all there in your handwriting?
A. Yes.
Q. And it will show clearly what took place?
A. Everything, yes, sir; everything is there.

The logbook is offered in evidence and marked Claimant's Exhibit A of March 29, 1913.

Q. What was the condition of your pipes, the strainer and rose boxes from the time you left Arecibo until this leak was discovered on the 28th of April when you were at sea?
A. All right.
Q. Before leaving Arecibo and while lying there loading was your attention called to any leak of the vessel?
A. No.
Q. From the time the leak was discovered on the 28th of April until you returned back to San Juan what do you say as to the pumps working, and the strainer and the rose boxes being in condition?
A. They were in first class order, both; we had occasion
157 to stop at times because the pumps got clogged up, the pipes with the sugar, and we had occasion to stop the pumps in between and clear them out.
Q. After that was done the pipes being clear what do you say about the action of the pipes how did they work?
A. They worked all right.

Q. How did you clear the pipes?

A. By stopping the pumps and taking the covers off the strainers in the engine room; there is cut-off valves there for the different departments; when you want to shift a pump from one to another—that is, where they get clogged up with sugar.

Q. Outside of the sugar clogging up the pumps how were the pumps acting, how did they act?

A. First class.

Q. You were able to bring back the ship from where you started with your own pumps?

A. Yes.

Q. And kept control of the water?

A. Yes, we did.

Q. After you arrived back at San Juan what did you do?

A. We kept the pumps going all the time.

Q. And they started to take the cargo out?

A. Yes, the following day.

Q. While they were taking the cargo out what did you do in regard to ascertaining or finding out where this leak had started?

A. The captain got a diver and sent him down underneath, but the first day he was not able to ascertain and find them that hole, but the second day he found it.

Q. Where did he find it?

A. No. 4 hatch.

Q. Where is that?

A. That is aft, after part of the ship.

Q. What part did he find the hole in?

A. In the ship's side leading into No. 4 hold of the ship through the ship's bottom.

Q. What part?

A. On the after part of the ship right under No. 4 hatch.

A. On the after part of the ship right under No. 4 hatch.

158 Q. How far from the keel up?

A. Four feet from the keel.

Q. Just a little on the turn of the bilge?

A. Yes.

Q. Did he report what he did?

A. After we got all the water pumped out and all the dirt and all the cargo and everything cleaned out we put the two plates on it and patched it up.

Q. What instructions did you give about stopping the hole or plugging it up?

A. When he found there was a hole in the ship's bottom we made him drive in a wooden plug *in* at the time.

Q. What was the plug driven in for?

A. To stop the water going in.

Q. After that what did you do?

A. I pumped out all the water.

Q. After that what did you do about stopping the leak?

A. I made preparations to put on a patch.

Q. What way did you put on a patch?

A. Put a plate on the outside of the ship and one on the inside, with packing on and bolt and nut.

Q. You bolted it through with a piece inside, and outside what did you put the bolt through?

A. The diver took it down and put it up to me, and I was ready to put the nut on the inside, and washer.

Q. What size was the patch?

A. Four inch in square the plates were.

Q. How did you use the bolt to connect the fastening of the two plates?

A. I took an inch bolt, and all I had to do was to put the plate on, and then I put some packing on the inside, and I screwed it up and it was as tight as a bottle.

Q. Was that the same patch that remained on from the time you left again until you discharged at Philadelphia?

A. Until we got in the dock at Philadelphia.

159 Q. After you came in the dock in Philadelphia did you have the same patch on and bring her to New York?

A. Yes.

Q. Before you put the patch on at San Juan over this hole, did you see the hole?

A. Yes.

Q. Describe it?

A. It was a hole about an inch in diameter right through the plating.

Q. Could you tell which way, by looking at it, it was broken, what way it started?

A. It appeared to be pressed up from the outside up to the inside.

Q. How did it look to you as to what was the cause of it?

A. I judge at the time she was fast aground at San Juan at Quartermaster's Dock some sharp substance had pressed through the plate and stayed there until we came to sea, and when we got—the ship got to moving and working it fell out.

Q. After you left Arecibo and were about a day out did you meet with some bad weather?

A. Yes, we had bad weather.

Q. How bad was it if you can remember it; would your log tell?

A. Well, I cannot tell, it was bad weather; we had a bad gale of wind, but nothing unusual; we have it very often, but it was a very stiff breeze of wind and the ship was laboring very heavily.

Q. How do account for the fact that if this substance was in and the hole was made while lying aground at San Juan, you got to sea before it started; how do you account for that?

A. If it was a substance that would go through the plate it would stay in the plate and remain there until the ship started to work back and forth, and when it did of course it would fall out, would work out, as there was nothing at sea that would do damage to the ship.

Q. How many years have you been going to sea?

A. Thirty years.

160 Q. I suppose in that thirty years you have seen a great

many injuries to parts of vessels?

A. Yes, I have, more or less.

Q. And you have also on vessels seen the class of pumps and pipes that are run for the purpose of taking the water out of the hold of a vessel?

A. Yes.

Q. From your experience what do you say as to the pumps or pipes, strainers and rose boxes which were in the Julia Luckenbach at the time you joined her, and up to the time you left her in New York on her return voyage, as to their condition and properly placed in the ship?

A. I say they were all right, yes, sir.

Q. And during the time you were aboard her for fourteen months did you have any trouble with them?

A. No, sir, never did.

Q. When you say that after you had got the cargo out of No. 3 and 4 holds and you went down and looked at this little hole as you say in the plate, about four feet from the keel, could you tell whether or not there was any cement around near that hole?

A. Yes, there had been cement, but it was all broken up at the time.

Q. Where was the cement near this hole?

A. There was no cement just around there then because it was all washed away.

Q. From you observation of the cement in the hold could you tell what the cause of this being displaced was?

A. No, I couldn't do that at the time.

Q. What was the cement there for, do you know?

A. To preserve the ship on the inside.

Q. Is that part of the construction of the vessel?

A. Yes.

Q. Is it customary to have it there?

A. Yes, sir.

Q. How far does it extend along inside the ship?

161 A. It goes up as far as probably—it goes three or four feet on the side.

Q. Is it on the bilges?

A. It is from the keel right on both sides.

Q. It comes up from the keel up around on the turn of the bilge?

A. Yes, sir; on the sheer line.

Q. From your observation of the condition of the cement where do you say it was disturbed or away from the ship?

A. It was disturbed right around there where that hole was; it was all gone.

Q. Forward of that hole and aft of that hole what was the condition of the cement?

A. It seemed to be broken around there in general.

Q. To what extent?

A. I cannot say exactly, but it was pretty well broken up.

Q. How was it in other parts of the vessel, do you know?

Mr. Kneeland: Did he see?

Q. Did you see other parts of the ship?
A. In most places it was all right.
Q. Did you see it?
A. Well, no, I didn't observe the other places around, no I didn't; at that time we couldn't observe anywhere but just there.
Q. But after you got the sugar out I mean did you see any other part of the ship?
A. Most part of it was cemented all over; the bottom was all cemented.
Q. How was it?
A. In a good many places it had got broke up.
Q. From your observation of that condition could you tell what the cause of that was?
A. I think it was from being on the ground when she was loading.

Mr. McGrann: Objected to.

162 Q. Could it be from any other way than by some contact to break it?
A. No, sir, it has got to come in contact with something to break it.
Q. During your voyage from San Juan when you reloaded the cargo, to Philadelphia, did you have any trouble with the ship leaking?
A. No.
Q. What do you say as to the pumps, were they able to control the water that might come into the ship during the seas that might be shipped on the voyage?
A. Yes.

Cross-examination by Mr. Kneeland:

Q. How many pumps had you on board?
A. For the purpose of pumping the hold?
Q. Yes, pumps that could be connected with the afterhold?
A. We have three.
Q. Will you describe them?
A. One is a Worthington pump; one is a Blake pump—two of them are Blake pumps.
Q. What is the capacity of the Worthington?
A. I couldn't exactly describe the size of them, but I think they have got the sizes; you can get the size from our people; I don't remember exactly the size.
Q. Weren't those pumps of capacity enough to have controlled the amount of water which entered through a hole an inch in diameter?
A. Yes.
Q. But they didn't?
A. Couldn't do it on account they got clogged up so often.
Q. When you got back to San Juan did you have to get assistance to get the water out?

A. Yes, sir, we got assistance.
Q. That was in what shape?
A. We got one centrifugal pump and one force pump from shore.
Q. Do you know the arrangement of the pipes?
A. Yes.
163 Q. Leading to the after compartment of the vessel?
A. Yes.
Q. Will you describe them, how many there are and where they lead?
A. There was one pipe suction leading to No. 3.
Q. Three and four are all open, are they not, one compartment?
A. Yes, they are one compartment.
Q. No. 3 and No. 4 hatches both lead into one compartment?
A. Yes.
Q. Was one suction into No. 3?
A. Yes.
Q. The size of it?
A. It was—the suction pipe there is three or three and one-half; I don't remember exactly.
Q. Inches?
A. Yes, sir.
Q. In diameter or circumference?
A. Diameter.
Q. Where did that lead?
A. That leads right down close to the bilge.
Q. In what part of the ship?
A. Right inside of the bulkhead of the cofferdam.
Q. Between your engine room and No. 3?
A. After engine room.
Q. After engine room?
A. Yes.
Q. Right down close to it?
A. She can take down there to three inches of water. The other pipe leads further aft coming down.
Q. There is only one?
A. No, sir, two pipes on each side.
Q. There was one suction leading to No. 3?
A. Yes, and one leading to No. 4.
Q. Was there only one pipe that led from the engine room to No. 3 hold just aft of the bulkhead?
A. Yes, from the pump, yes, sir; there is only one from each side; only one from each side.
Q. There are two, one on each side?
A. Yes, sir, two.
Q. Now, about No. 4?
A. There is another pipe leading to the strainer box; the
164 pipe extends through that to the ship's bottom; it runs through the shaft alley.
Q. That is a single pipe?
A. Yes, same kind of pipe leading right aft.

Q. Only one instead of two?
A. There is a strainer box in the shaft alley.
Q. It is only one pipe?
A. Yes, one pipe leads from the pump.
Q. The size of that is what?
A. Four inches, about.
Q. In diameter?
A. Yes.
Q. It leads to a strainer box in the shaft alley?
A. Yes.
Q. There are branches led off from that?
A. Yes.
Q. How do they run?
A. Right out into the ship's side in No. 4 hold.
Q. What part of No. 4 hold?
A. About the middle of No. 4.
Q. Doesn't that pipe through the shaft alley run way back?
A. Yes, that runs way back to the strainer box there.
Q. Is that near the after bulkhead of No. 4?
A. Not so far as the after bulkhead.
Q. Then it branches off to each side?
A. Yes.
Q. And goes up the side of the ship?
A. Yes.
Q. Then doesn't it lead forward again?
A. Not then to pipes, it leads right out into the wing in the ship where the lowest part of it is.
Q. You have spoken of having examined your rose boxes and strainers from time to time?
A. Yes.
Q. During this voyage; what rose boxes do you refer to?
A. The ones in this pipe we speak of now.
Q. Was it possible to examine those rose boxes when the vessel was loaded?
A. No, sir.
Q. You could not even examine the rose boxes which were attached to the suctions of No. 3, could you?
165 A. Couldn't examine any of them when there is cargo in.
Q. I suppose there are rose boxes on the end of these branches?
A. Yes.
Q. As well as one connected with a cock in the shaft alley?
A. No—well, there is a suction pipe in the shaft alley, but the one that leads out on the branch there is a strainer box set on each of those pipes.
Q. When did you ever see those strainer boxes?
A. Every time we are examining the hold and see that the pipes are clean.
Q. When did you examine them?
A. We examined them that time, I think; I am not positive

whether we examined that time or not.

Q. Do you remember that there was some ballast in the after part of the vessel?

A. Yes, but that is a distance away from where we speak of.

Q. How far forward did that ballast extend?

A. I should think about ten or twelve from the very stern of the boat; that is, only a small compartment right aft, that ballast was stowed away.

Q. Are you referring to the condition of the vessel after she was overhauled in New York after this loss or before?

A. We are talking—of course, after that repair done at that time when she had the collision.

Q. Not before repairs which were done after this loss happened of the sugar?

A. Are you referring to that?

Q. No, I am referring to the condition before that?

A. Yes, previous to that.

Q. Isn't it a fact that that ballast which was in the after part of the vessel extended clear up to No. 4 hatch?

A. Maybe it did up to No. 4; but I hardly think so.

166 Q. Isn't it a fact that you had to move that ballast in order to get down to look at this hole?

A. I don't know if we moved that ballast—not to get to that hole, but I think they moved the ballast to examine the ship all over; I know they took that ballast all out.

Q. Isn't it a fact that they had to move the ballast in order to get the ceiling up to get down and examine this hole?

A. No, sir, that we had not.

Mr. Carter: Mr. Kneeland, what do you refer to, examining the hold and removing the ballast at San Juan or after she returned to New York, what have you reference to?

Mr. Kneeland: I am referring to the time when they got down to stop this hole up.

Mr. Carter: At San Juan?

Mr. Kneeland: Yes.

A. We didn't have to remove that ballast.

Q. You are positive of that?

A. Yes, positive.

Q. Did you go down while the work was being done?

A. I was down there nearly all the time, off and on.

Q. When did you ever see any of the ceiling in the afterhold?

A. We took a part of the ceiling, which was made for that purpose, to examine the strainer and those places.

Q. Those were little places which were over the ends of the suction pipes?

A. Yes, little hatches like.

Q. Is that the only part of the ceiling in the after part of the ship which you ever saw raised?

A. I saw that ceiling raised over that hole when we patched that hole up.

Q. That is the only time that you ever saw any part of the ceiling in the after part of the ship raised except these plank-
167 ings which are fixed for raising over the suction pipes?
A. Yes.

Q. That was after this leak occurred?

A. Yes.

Q. You have had a good deal of experience in service on vessels carrying sugar?

A. Well, I can't say I have had exceedingly much experience in carrying sugar; I have been in vessels carrying sugar off and on.

Q. Were you carrying sugar during all this period you were running in the Julia Luckenbach?

A. Yes, sir—no, we were not carrying sugar all the time; we were in the sugar trade for some months.

Q. It is particularly necessary to keep the cement on a vessel's bottom in good condition when the vessel is carrying sugar?

A. I cannot say anything about that because I cannot say whether it is absolutely necessary or not; but, of course, it is necessary to have cement in the ship's bottom, it doesn't matter what she carries.

Q. What did you carry on your outward voyage?

A. Carried general cargo; I couldn't say exactly what she carried; she carried always different kinds of cargo.

Q. I notice in your log of the 24th, the day you arrived at San Juan discharged cement and loaded sugar?

A. Yes, sir.

Q. Did you have any quantity of cement?

A. Yes, we generally have some, how much it would be I couldn't say because I was not very familiar with the different parts of the cargo.

Q. When was this entry in your log of the 25th, "Hard aground at Quartermaster's Dock while loading the last of her cargo," put in?

A. It would be put in at the very time it happened; generally every day at noon I write my log, sometimes in the evening at 6 o'clock when we knock off the day's work.

168 Q. Was it written in at the same time as the other entries of the 25th?

A. Every day I write the log, generally.

Q. You don't make your entries directly into the log, do you?

A. No.

Q. You make a memorandum?

A. I make a memorandum while we are at sea, and while I am in port I make them directly.

Q. Directly into your log?

A. Yes, according to my observation of the day's performance.

Q. How did you lie at Quartermaster's Dock, bow in or bow out?

A. Bow in always; bow in always.

Q. Do you know what your draft was leaving San Juan?

A. No, I do not.

Q. You didn't put any draft in your log?

A. I put in the draft as a rule when we are loaded, our departure.

Q. When you leave the last port?
A. Yes, sir.
Q. You don't appear to have it on this occasion?
A. Maybe not.
Q. Do you know what your draft was?
A. No, I do not.
Q. When you left Arecibo?
A. No, I don't remember it.
Q. Have you loaded this vessel in Quartermaster's Dock on prior occasions?
A. Yes, sir.
Q. Had she been aground before?
A. Well, some time she had been touching the ground.
Q. The bottom there is soft mud, isn't it?
A. No, I don't believe it is.
Q. I notice in your log under date of May 2, at San Juan, Captain Kenney and Conners worked up to 12 getting the pump up?
A. Yes.
Q. Two pumps in the engine room kept going?
A. Yes.
169 Q. What do you mean by getting the pumps up?
A. They were getting pumps from shore, those two men.
Q. That is a circulating pump and a——
A. The centrifugal pump and force pump, yes, sir; we had a great deal of trouble getting them, too.
Q. How much of your ceiling did you have up at San Juan?
A. I think we took up considerable ceiling; we took up lots of ceiling there at that time.
Q. Under date of May 5th I notice "Worked night and day reloading the ship, ceiling all up for inspection aft"?
A. Yes, cleaning her aft.
Q. Examining strainer and pipes?
A. Yes.
Q. Do those mean at the end of the suction pipes?
A. Yes.
Q. Do you remember what you found?
A. The pipes were all right and we had to open them up; they were more or less clogged up with this dirt, and there was lots of bagging the sugar was in and all that coming into the pipe and into the hold, and we had to clean that out before we took in cargo and proceeded on.
Q. Will you tell me how the bagging got into the ceiling?
A. I won't say that the bagging got through the ceiling.
Q. It had to get into the pipe?
A. There might have been places where the ceiling would probably be more or less not so very tight, but I don't know that; we found the pipes were not so very bad, there was more or less dirt in them; there was some dirt in them; there was some bags that got in there; the ship pulling ahead and working back and forth was liable to break up the ceiling and I couldn't say exactly where

the ceiling was broke up; the mate will be able to tell you about that.

Q. You didn't have anything to do with the shifting of the cargo?

A. No.

170 Q. It wouldn't come in your department?

A. No.

Q. After you got this repair made connecting this place by putting these plates on with a screw bolt through them, was the ballast put back over this place?

A. I don't recollect anything about this ballast because we didn't have no ballast there; the ballast was further aft in the hold; I don't know that the ballast was taken out; it might have been, but I couldn't say, but it didn't interfere with putting the small plates on.

Q. This hole, you say, was about four feet from the keel?

A. I should judge about that; I wouldn't say to an inch or two.

Q. Do you remember which strake it was near?

A. No, I don't know.

Q. Was it outside of the shaft tunnel?

A. Yes.

Q. About how far; do you know how wide your shaft tunnel is?

A. Yes, my shaft alley is about four feet.

Q. Then it would be two feet or so outside of the shaft tunnel?

A. Yes, sir.

Q. How far aft of No. 4 hatch?

A. It was the after part of the fore hatch, the after part.

Q. Do you mean by that opposite the hatch or within the hatchway?

A. Aft of the hatch.

Q. Aft of the after coaming of No. 4 hatch?

A. Yes; I don't remember if they had to move that ballast or not; they probably did move some of that ballast at that time.

Q. In order to get down to this place?

A. Well, it might be so, it might be so that they had to move it to get up the ceilings around there; they might have done that; I wouldn't like to say anything; I am not positive of that; the chief officer had charge of that.

Q. These hatchways or movable ceilings over these strain-

171 ers at the ends of the branch pipes in No. 4, they were quite a distance back?

A. Quite a distance forward.

Q. Forward of the after bulkhead, that is, they were aft of No. 4 hatch?

A. No, there is only one of them come down through, one in the middle of No. 4 hatch as near as I can recollect, in the hold.

Q. Have you ever seen that line of pipe?

A. I seen that every trip.

Q. You have seen the whole line of piping running out from the shaft tunnel to the rose boxes?

A. No.

Q. You have never seen that?
A. No, I haven't seen that part of it.
Q. That part of the ship had never been uncovered?
A. I can't say that it hadn't been uncovered.
Q. You had not seen it?
A. No, I ascertained about the other end of the pipe when the men—there is a part of the pipe and you have to tear up the whole ceiling to see and I had not seen that.
Q. The only part of the suction pipes that you had ever seen in the after hold was the part where the strainers were or rose boxes?
A. Not necessary to see any part of the pipe if they find the suction is cracked at the end.
Q. Is it not so that the only part of that line of pipe which you had ever seen was the ends where the strainers were?
A. Yes, I have seen it in the shaft alley; I seen the pipe in the shaft alley, but there is a few feet you can't see without tearing up the ceiling in the bottom and I had not seen that.
Q. You were not aware, were you, that these pipes led out towards the side and then led forward again?
A. I am familiar with the line of that pipe thoroughly.
Q. Did it or did it not branch off towards the side of the ship, towards the shaft alley and then lead forward?
A. I cannot say it led forward; it leads right out into the ship's side.
172 Q. You mean it runs straight out from the shaft tunnel?
A. Yes.
Q. And at the end of the straight pipes or rose boxes?
A. Yes.
Q. [illegible] are aware of that?
A. Yes.

Cross-examination by Mr. McGrann:

Q. Can you make a little sketch showing the pumping arrangement in the after part of the ship?
A. You have the arrangements of the pipe already.
Q. Can't you indicate the three pumps, take this part to be the engine room (indicating)?
A. Yes.
Q. The after part of the ship?
A. You have that already specified; you can get it.
Q. I want you to put it down?
A. We will say this is the starboard side (indicating); here in the engine room is one pump, here is the other pump the piping and connection of course they have got that already; they took that at the time. We will say this is the bulkhead and connection coming from this pipe (indicating); this pipe comes along here and here is the strainer with the three weight valve and here goes the pipe out; that, we will say, is No. 4 leading from this fellow (indicating).
Q. Suppose you make the arrangement and we will go over it and mark it?
A. I would not like to make another one because we have one

already made; you can easily get it; we had a man on board there and we took down everything.

Q. Where is that pumping arrangement that you say you have?

A. The pumping arrangement is either in the office or somewhere, in some place.

Mr. McGrann: Can't we have the pumping arrangement?

Mr. Carter: I don't know where it is.

173 The Witness: If I make a specification of that I couldn't very well exactly tell that just now.

Q. You have described it to Mr. Kneeland?

A. Yes, I will describe it again; here it is right there; there is a pipe leading right along, there is a valve; that is the middle of the shaft alley.

The point the witness is designating as the three-weight cock is marked A.

The witness states that it is in the middle of the shaft alley.

Q. There is just one shaft alley?

A. Yes.

Q. It runs down something like that (indicating)?

A. Yes.

Q. What is on each side of the shaft alley?

A. A cargo hold, the hold of the ship.

Q. No. 4 hold?

A. Yes, and No. 3 hold also.

Q. They are designated by 4 on each side?

A. That fellow goes right up to this bulkhead (indicating).

Q. That hold goes right up to the bulkhead?

A. And the shaft alley, yes.

Q. Being the bulkhead between the engine room and No. 3 hold?

A. No. 3 hold.

The shaft alley is marked C and D.

Q. Do I understand there is no bulkhead between No. 3 and 4 hold; you have been speaking of No. 3 and 4 hold; is that one big compartment?

A. That is one continuous one.

Q. And there is no bulkhead between?

A. I don't think there is.

Q. You call it No. 3 and 4 because there are two hatches which are known as No. 3 and 4 hatches?

A. Yes, sir.

174 Q. And No. 3 and 4 holds run right up to the engine room?

A. Yes.

Q. And the shaft alley also runs up there, of course?

A. Yes.

Q. Is the shaft alley open into the engine room bilge?

A. Yes, there is a bulkhead between the engine room and the shaft alley.

Q. Isn't there a part of that—there must be a part of that open?

A. The part where we go into the shaft alley is open; there is a door where you go in and out.

Q. The shaft runs through there?

A. Yes, but that is a stuffing box.

Q. Where is the stuffing box?

A. On the bulkheads.

Q. How do you drain that bilge or that shaft alley?

A. We pump that out; we have lines of pipe.

Q. Is there any way of draining it into the engine room?

A. We have that water tight; we pump that out with pumps.

Q. How did you discover the water in the shaft alley?

A. By going in there.

Q. You have an entry in your log under date of April 28, "Discovered shaft alley full of water, at 6.40 P. M. put pumps on and notified the captain"?

A. Yes.

Q. Were you on watch at 6.40 yourself?

A. No, I am not on watch at any time.

Q. Who discovered this?

A. The first assistant.

Q. Was he the first person who saw this water?

A. Yes.

Q. Hadn't they discovered it on deck?

A. No.

Q. How did he discover it; does he take soundings or did he see the water?

A. He discovered the water coming through the side of the shaft alley.

175 Q. Where, into the engine room?

A. Into the shaft alley.

Q. He walked into the shaft alley?

A. Yes.

Q. And there was no water at that time showing in the engine room?

A. No, sir, there was no water coming into the engine room at any time because there is a bulkhead there between the engine room and No. 3 hold.

Q. Was there any means of sounding the shaft alley?

A. Yes, we can sound the shaft alley.

Q. Can they sound it from the deck?

A. No, sir.

Q. You are quite sure of that?

A. Yes, you can't sound that.

Q. Do you have to report the soundings of the shaft alley?

A. No, we don't report that.

Q. You don't report that to any one?

A. No, sir. You want to find out that there is lots of water in the hold and that came into the shaft alley on account of being water in the hold.

Q. I want to know how you discovered this water?

A. It ran through this side of the shaft alley when we discovered it.

Q. Did you go down yourself when he reported it?

A. No.

Q. When was the first time after 6.40 that you went into the engine room?

A. Not at all, only when I was called I came to the engine room and saw there was water in the hold.

Q. What time was that?

A. I think it says in the log.

Q. It says, "Stopped the engines at 7.39."

A. Yes, but we noticed the water before that.

Q. I want to know when you got into the engine room after 6.40?

A. It says there.

Q. It doesn't say here when you saw it; I want to know when you personally saw it?

A. When I first saw it; it is in the log.

Q. What time was it?

A. It is there in the log.

176 Q. Point it out to me; it says, "6.40 P. M. put pumps on and notified the captain."

A. That is right; that is the time I discovered the water.

Q. You told me you did not discover it, that the first assistant discovered it?

A. He notified me at once; he found there was water coming into the shaft alley.

Q. Without coming down to inspect it you notified the captain?

A. No, I put the pumps on.

Q. When did you go into the engine room?

A. That very moment.

Q. Why didn't you say that before?

A. I might have misunderstood you.

Q. Does this bulkhead on either side of the shaft alley continue up to the top deck, or is it only part of the way up, say six or eight feet?

A. You mean between the engine room and the hold?

Q. No, this bulkhead, this longitudinal bulkhead on each side of the shaft alley, how high is that?

A. That extends somewhere in the neighborhood of five or six feet.

Q. There is a top to it, a deck or ceiling?

A. It is covered; it is sheathed with wood.

Q. The cargo is on top of that?

A. Yes, sir.

Q. Where was this with respect to the shaft alley; where would you say this hole was?

A. The plating of the shaft alley itself was leaking through a small hole leading into the hold of the ship.

Q. Two small holes?

A. Several small holes where the shaft alley had been sheathed in wood; you see there was holes been left open that had not been plugged up altogether, and there was where the water ran through.

Q. From the outside or from the cargo?

A. From the outside.

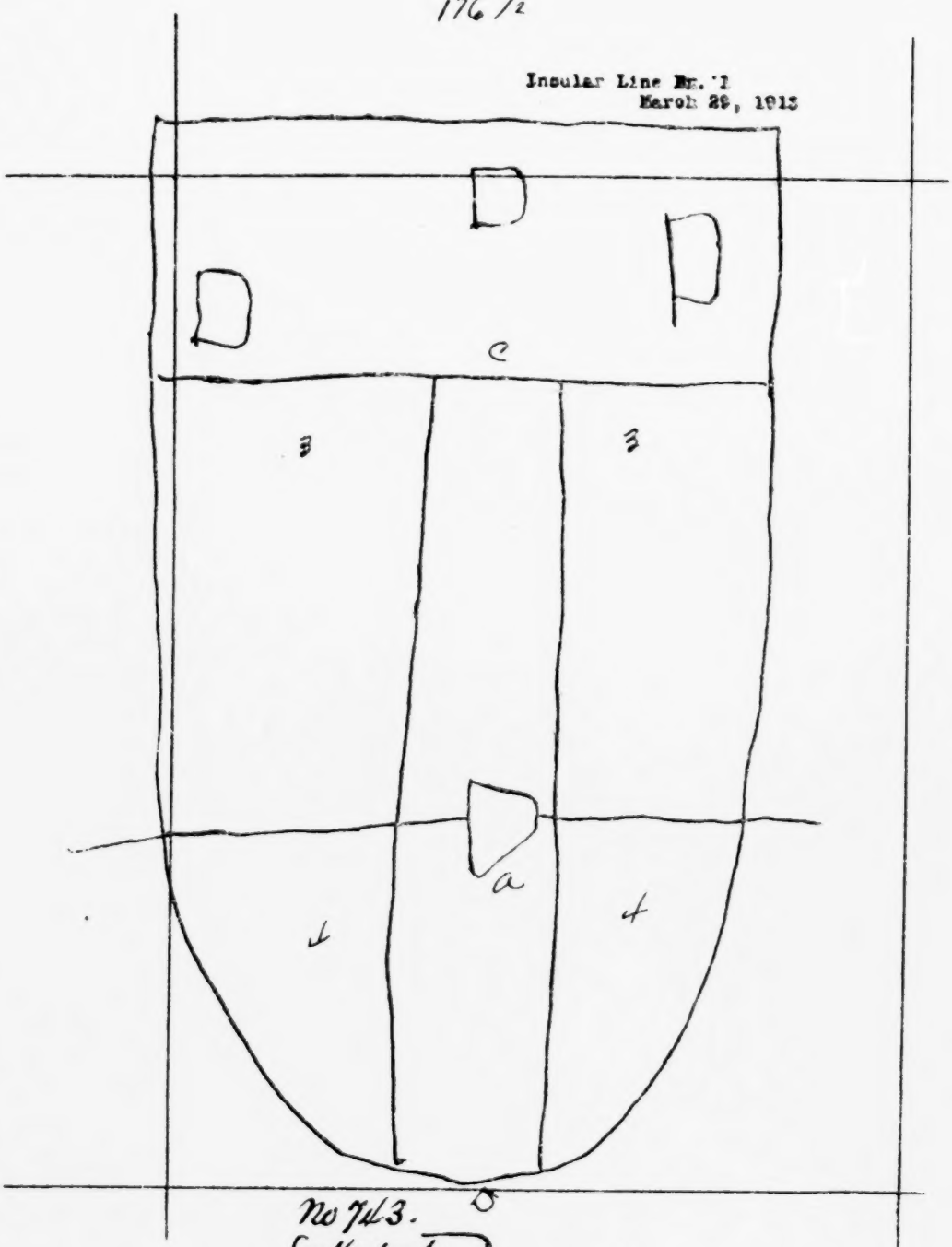
Q. How wide is the shaft alley?

A. In the neighborhood of four feet, I should judge.

(Here follows diagram marked page 176½.)

176 ½

Insular Line Dr. 1
March 29, 1913




No 743.
Luckenbach
&
McCahan Sugar
Refining Co.
} P 176 ½

177 Q. Where was this hole which was punctured in, you said about——?

A. That was at No. 4 hatch.

Q. How far was it from the keel of the ship?

A. It was about four or five feet.

Q. That hole didn't enter the shaft alley, did it?

A. No, it didn't run into the shaft alley.

Q. The hole wouldn't be under the shaft alley?

A. No, sir, it was outside of the shaft alley, but the water did run into the ship because it was an empty space in the shaft alley so it could run in.

Q. What I do not understand is, how the water got from No. 3 hold or No. 4 hold into the shaft alley?

A. You have not understood it was six or seven or eight feet of water in the hold, it would run in anyway where there is an open space.

Q. Do you mean to say these longitudinal bulkheads are not water tight?

A. It was not water tight.

Q. Aren't they intended to be water tight altogether?

A. I don't know; sometimes they are water tight and sometimes not; I think they should be water tight, but in this case they wasn't, I think, but if they were water tight in this case probably we would not have known and the ship would have gone done.

Q. You say it was not water tight between the shaft alley and No. 3 and 4 hold?

Mr. Carter: Objected to as incompetent and not within the issues pleaded either in the libel or the answer of the Insular Line.

A. The shaft alley was not water tight and it would be a sorry sight for us if it was at that time.

The diagram made by the witness is offered in evidence.
Objected to as incompetent.
It is marked Insular Line Exhibit 1 of March 29, 1913.

178 Q. April 27 you have an entry in the log, "Cleaned bilges, strainers, engine room and fire room"?

A. We had been lying in port.

Q. That was, I understand, after you arrived at Arecibo or after you left, which was that?

A. This will be before we went to sea; this was before we left for sea; that is the last thing we do, clean the engine room, strainers and bilges and fire room.

Q. You left Arecibo at 5 P. M. the 26th for Philadelphia?

A. We left Saturday night between 7 and 8 o'clock.

Q. The 26th, wasn't it?

A. The 27th; this is when we left (indicating).

Q. Is that the 27th?

A. Yes.

Q. On the same day, the day you left, you had cleaned all the

engine and fire room bilges?

A. Yes.

Q. And examined the strainers?

A. Yes, but not those strainers that we are alluding to now because the ship was loaded then; this is my engine room work I am talking about here.

Q. When you say the engine room, would you also clean the bilges of the shaft alley?

A. No.

Q. Who cleaned the bilges of the shaft alley?

A. We do that odd times, but we didn't do that this very time.

Q. How do you know?

A. We did this merely for our own purposes when we go to sea, that is the last thing we do, we clean up in the engine room and fire room to make sure the pumps are all right.

Q. Do you inspect the shaft alley every day?

A. Yes, every watch we have the pumps on there.

Q. If there had been any water in the shaft alley prior to 6.40 on the 28th how would you have discovered it?

A. We would discover that right away because there is only the ceiling there, the water would be on the ceiling where we walk: we have bearings on the shaft alley.

179 Q. The bottom skin of the ship is all open to view?

A. There is a ceiling we walk on, that is open on one side of the ship.

Q. You can see the bottom skin of the ship, can you, without lifting up anything?

A. Yes, we can.

Q. In the shaft alley?

A. Yes.

Q. If there had been a foot of water in the holds would it have shown in the shaft alley?

A. Yes, sir.

Q. Then it is pretty certain there was no leaking into the ship until the 28th, that is the day on which you discovered the water in the shaft alley?

A. I couldn't say when the water was leaking in the hold, but there was none in the shaft alley.

Q. You have just said if there was a foot of water in the hold it would show in the shaft alley?

A. No, sir; no, sir; no, sir, I misunderstood you.

Q. You didn't mean that?

A. No, sir, I didn't mean that, oh, no; it doesn't indicate any water in the shaft alley.

By Mr. Carter:

Q. How would you ascertain how the water would first get into the shaft alley?

A. By running through the side of the alley.

By Mr. Kneeland:

Q. You mean that no water would show in the shaft alley until the water had risen high enough in the cargo hold to run through these holes in the side of the shaft alley?

A. That is what I mean.

By Mr. McGrann:

Q. Can you tell how high from the bottom of the ship these holes are that you refer to?

A. I think probably about 5 feet 6, or 6 feet.

Q. What is the use of those holes?

180 A. They are only small holes that has probably been left when the covering of the shaft alley has been removed.

Q. They serve no purpose?

A. They serve no purpose, no.

Q. You joined the ship December 14, 1911?

A. No; I joined her on the 2nd of November, 1911.

Q. What was the date December 14?

A. I was first assistant on her before I became chief?

Q. That was the date on which you became chief?

A. Yes.

Q. Where did you serve before November 2nd, with the Luckenbachs?

A. Yes, sir.

Q. How long have you been in the employ of the Luchenbachs?

A. I was two years on one steamer, first assistant.

Q. Before November 2nd?

A. Yes, sir.

Q. Two years?

A. Yes.

Q. Then you were transferred from that steamer to the Julia Luckenbach?

A. Yes, sir.

Q. Are you still in the employ of the Luckenbachs?

A. Yes.

Q. They, of course, pay you your wages; throughout the time you have been employed you have been paid by the Luckenbachs?

Objected to as incompetent and immaterial.

A. Yes, sir, when I work I am paid and when I don't work I am not paid.

Mr. Carter: I move to strike out the answer as not responsive, no question being put to witness, and furthermore if Mr. McGrann examines the witness along this line he makes him his own witness.

Q. You said you were on her when this collision occurred with the Horatius?

A. Yes.

181 Q. Do you recall when that was: was it while you were chief engineer?

A. Yes, I was chief engineer.

Q. It was some time after December, 1911?
A. I can't exactly tell the date when that happened.
Q. Was it after December, 1911?
A. Yes, it was after.
Q. And that was only about four months before this damage occurred?
A. I don't know that this collision had anything——
Q. That was about four months, wasn't it?
A. Yes.
Q. And she was on the dry dock after the collision?
A. Yes.
Q. For three or four days?
A. I don't know exactly how long she was there, but I know she was on the dry dock.
Q. Did you, yourself, make an inspection of her outside plating?
A. No, I didn't have anything to do with that.
Q. Who did that, what ship's officer?
A. The superintendent did that, superintending engineer and superintending boilermaker.
Q. Of the Luckenbachs?
A. Yes, sir.
Q. Do you know what the superintending engineer's name is?
A. Mr. Work.
Q. And the boilermaker?
A. His name is—I don't know his name.
Q. They usually made an inspection and not the ship's officers?
A. The ship's officers has nothing to do with the plating; there is a certain amount of work they look after.
Q. When you have repairs to be done you report it to one or the other of these gentlemen, is that the idea; do you make a report to the superintending engineers?
A. Yes, sir.

Q. Do you recall making any reports while you were in
182 dry dock after having the collision with the Horatius?
A. I don't remember exactly.

Q. If you had had any reports to whom would you have made them; to Mr. Work?
A. Yes.
Q. And he would know, would he?
A. Yes, sir.
Q. Did you ever make any reports of this matter to the purser or the dock superintendent of the Insular Line?
Objected to as incompetent and not within the issues either in the libel or answer of the Insular Line.
A. I don't remember as I did.
Q. Did you ever have any dealings while you were chief engineer of the Julia Luckenbach with the purser or dock superintendent of the Insular Line as to repairing the ship?
Same objection.
A. I don't remember.

Q. You don't remember?
A. No, sir.

Mr. Carter: I also object on the further ground that Mr. McGrann makes the witness his own.

Q. You said you put this entry yourself in the log about the ship being hard aground: how do you know that?
A. I don't remember it.
Q. What is it you don't remember?
A. I don't remember how I came to know that now; I don't remember.
Q. As a matter of fact, did you know it of your own knowledge?
A. I don't remember; I don't remember exactly how I came to know it; it is a long time ago.
Q. You made the entry in the log didn't you?
A. Yes.
183 Q. Did you make it from your own observation or did some one else tell you?
A. I don't think anybody told me; I think I am knowing the ship was fast aground, and that is very hard to explain to a man who is not used to it.
Q. Did you make any examination of the shaft alley or the engine or fire room bilges while you were aground?
A. No, it states in the log when I made them.
Q. You didn't make any at that time.
A. No, sir, no indication of any leak at that time.
Q. You are quite sure that there was no indication of any leakage until the 28th?
A. I didn't see any.
Q. When did you first see this hole that you say caused the leakage into the ship; was that at San Juan after you put into San Juan?
A. Yes.
Q. That was after the wooden plug was put in by the diver?
A. Yes, sir.
Q. Then you pumped out 3 and 4?
A. Yes.
Q. And you yourself then saw the hole?
A. Yes.
Q. That was while the wooden plug was in it, of course?
A. Yes.
Q. That was the first time you saw any indication of breaking of the cement?
A. I don't remember anything about the cement just now.
Q. You remember that it was broken, do you; you have already testified here that it was broken?
A. Yes.
Q. That plug was driven in from the outside?
A. Yes.
Q. From the outside in?
A. Yes.

Q. Did you notice any buckling of the plates except where this hole itself was?

A. No, I didn't; there might have been; the surface you mean?

Q. Yes, the surface of the plate was not buckled up at all?

A. It was a little.

184 Q. Over all the surface?

A. Just at the hole.

Q. The edges only?

A. Yes.

Q. But the plate itself was not?

A. No, the plate was too strong to be buckled.

Q. You said it did not give any indication of having been punctured from the outside, didn't you?

A. No, I didn't.

Q. What was the indication you saw, if there was any, of how it occurred?

A. The looks of the plate showed on the inside it had been punched in.

Q. Wouldn't this same effect result from driving in a wedge into the hole from the outside inward?

A. From inward?

Q. Fom outside inward?

A. Yes, it might.

Q. It would be the same effect, wouldn't it?

A. It would be the same as if you were punching a hole through anywhere.

Q. That is what you saw here?

A. Yes.

Q. You didn't see any foreign substance around inside when you examined it that time in San Juan, did you?

A. No, I didn't.

Q. There was nothing but the cement and plating and wooden plug?

A. The cement and everything was all washed away; it was as clean as this almost (indicating the table).

Q. Over considerable area?

A. On the inside.

Q. You don't know anything about the depth of water in San Juan Harbor?

A. I don't remember.

Q. Do you know anything about the depths, did you ever know anything about them?

A. I don't remember how deep we had that water.

By Mr. Kneeland:

Q. Where this hole was in the plate was it a pocket there formed by the floors and the intercostals and things of that kind?

A. It was very close to an angle iron.

185 Q. And all that part of the ship is divided up into little sections by the floors and by the pieces that go between them?

A. Yes, sir, there is small pockets there; there was not a very large space being at the bottom of the ship.
Q. Did you notice the cement being broken in any other pockets?
A. No.
Q. Only in this one pocket the cement was already gone?
A. Gone around there.
Q. Do you know how thick your plate was?
A. No, I don't remember exactly.
Q. Did you see it when it was cut out?
A. No, we didn't cut it out.
Q. Afterwards it had to be repaired?
A. Yes, sir, we put a patch on the outside.
Q. Do you know how thick the plate was?
A. I should judge about five-eighths.
Q. You spoke of the rags?
A. The rags was just rags; they stayed inside; you couldn't tell much about them.
Q. You mean the thin edges of the plate?
A. What had been punched in.
Q. Did you get your hand in that hole?
A. Yes, I put my hand in it.
Q. Were the edges around the hole pretty thin?
A. No.
Q. The plate was not worn at all?
A. I wouldn' swear to those things; it might have been a little.
Q. Coming back to the time you were on the dock after the collision with the Horatius, do you remember whether you had the bottom painted then?
A. Yes, we had.
Q. All over?
A. Yes.

Redirect examination by Mr. Carter:

Q. In reference to the rose boxes and strainers you had on board the ship, what do you say as to whether or not they were
186 sufficient in number; were there enough aboard?
A. Yes, we had plenty of them; there was some of them washed off at that time when we were there and had not been replaced; during the time all this water was in there some of them had been washed off when the ship had been rolling.
Q. What I want to know is before any accident happened at all to your ship, when leaving Arecibo to go to sea, were the rose boxes and strainers in the ship sufficient in number for its use?
A. Yes, sir.
Q. Before the wood or plug was put into this hole, when you arrived back, did you see the hole in the plate?
A. No.
Q. You say you put your hand in the hole; do you mean your whole hand?
A. I mean my finger; you couldn't get your whole hand in; it was only a small hole.

Recross-examination by Mr. McGrann:

Q. About this clogging of the pipes, I understand that the clogging was at the manifold valve box in the engine room, was it?
A. That is where we cleaned it out.
Q. You cleaned out the sugar and debris, whatever it was, right from the box in the engine room?
A. Yes.
Q. Then you closed the box and started pumping again and you got water?
A. Yes.
Q. How many times about did you have to do that?
A. Every twenty minutes or half an hour.
Q. It was always successful, was it?
A. The clogging up was not satisfactory but the pumping was.
Q. The cleaning out and starting again, you always succeeded in getting water for that?
187 A. Yes, always.

By Mr. Carter:

Q. And in the choking of the pipes that you have been testifying to under the examination of the two counsel, that has reference to the cargo itself choking the pipes?
A. Cargo choking the pipes up all the time.
Q. There was no choking of the pipes prior to the leaking?
A. No.
Q. The pipes were in good order?
A. Yes.
Q. Is that right?
A. Yes, sir.

*Deposition of Captain Daniel Rodick, Taken under Notice on Behalf of the Luckenbach, at the Office of Messrs. Burlington, Montgomery & Beecher, No. 27 William Street, New York City, on April 5, 1913, With the Same Appearances and under the Same Stipulation as Heretofore Noted.*

DANIEL RODICK, being duly sworn and examined as a witness for the Luckenbach, testifies as follows:

By Mr. Carter:

Q. You were master of the steamship Julia Luckenbach on the 13th of April, 1912, were you not, when she started on her voyage from New York to ports in Porto Rico?
A. Yes, sir.
Q. What ports, if you remember, were you bound to from New York?
A. Bound to Ponce and Aguadilla.
Q. And also to what other ports did you go?
A. San Juan and Arecibo.

188 Q. I show you this book and ask you whether or not this is the log of the Julia Luckenbach on her voyage when she left New York April 13, 1912, up to the time she discharged her cargo at Philadelphia and then came back to New York?

A. Yes, sir.

Q. In whose handwriting is this logbook from April 13 up to the time of your return to New York?

A. Chief officer's.

Q. Is your signature down there?

A. Yes.

Q. Your signature is attached to each of the dates and occurrences as entered in that log?

A. Yes, sir.

Q. Before signing the log did you read over the entry for each and every day?

A. Yes, sir.

Q. Were they correctly stated at the time you read them for each day?

A. Yes.

Q. After that did you sign the log?

A. Yes; I signed it after reading each day's occurrence.

Q. That is your signature?

A. Yes, that is my signature.

The pages of the log from April 13 up to and including the voyage to Philadelphia and discharge, and return to New York, are marked for identification Claimant's Exhibit A.

Q. When the steamship left New York on the voyage to ports in Porto Rico April 13, 1912, what was the condition of your steamship?

A. Strong, staunch and seaworthy in all things.

Q. Aboard your boat have you a certain practice or mode of procedure that you adopt during the voyage to ascertain whether or not the ship is in good condition during the voyage?

A. Yes.

Q. What is that practice or mode of procedure that you adopt to ascertain her condition?

A. That is to sound the ship.

189 Q. And who does that?

A. The carpenter.

Q. What time does he take the soundings of the ship?

A. Three times a day, eight o'clock in the morning and at noon time and at four o'clock in the afternoon.

Q. When those tests are made by the carpenter are they afterward reported to you?

A. Yes.

Q. And to who else aboard the ship?

A. Chief officer.

Q. During the voyage out from New York to the first port, Ponce in Porto Rico, what was the condition of your vessel as to the reports from the carpenter?

A. She was in good condition, seaworthy condition.

Q. The condition as found on each of the days is marked in the logbook?

A. Yes.

Q. What word do you use to indicate her condition; what word did you use?

A. Dry.

Q. From the time she left New York until she arrived at Ponce what was her condition?

A. She was dry and in good seaworthy condition.

Q. After you left Ponce and went to Aguadilla what was her condition then?

A. She was in good condition, the same.

Q. Were the tests made on leaving Ponce to go to Aguadilla in regard to finding out her condition on the voyage?

A. The test was made every day, each day.

Q. On your arrival at Aguadilla you discharged the balance of your cargo, did you not?

A. Yes.

Q. Then you went to San Juan to load?

A. Yes.

Q. On your arrival at San Juan or at San Juan how did you receive your orders to go there to load?

A. I had written orders, from the agent of the Insular Line.

Q. The charterers of the steamship?

A. Yes.

Q. Were those orders oral or were they in writing?

A. In writing.

190 Q. I hand you this letter of the Insular Line dated San Juan, April 23, 1912, and ask you whether or not that is the letter which you received to go to San Juan to load?

A. Yes, that is the letter.

Q. On receiving that letter you proceeded to San Juan to Quartermaster's Dock?

A. Yes.

The letter is offered in evidence.

Mr. McGrann: Objected to as immaterial, irrelevant and incompetent.

It is marked Claimant's Exhibit B of April 5, 1913.

Q. From the time you arrived at Quartermaster's Dock up to the time of finishing the cargo there what was her condition?

A. The same as leaving New York.

Q. And the tests made were the same while lying there?

A. Yes, tests were made each day.

Q. During the time you started to load at San Juan and up to the time you finished loading, do you remember whether or not your steamer was always afloat?

A. No, she touched the bottom while loading.

Q. I call your attention to the report of your log under date

25th of April, and ask you to please read what that entry is in regard to the vessel ashore or aground?

A. 10.15 P. M., ship fast aground, Quartermaster's Dock, San Juan, while loading; midnight clear and fine; that is all there is about it.

By Mr. Kirlin:

Q. What date?

A. The 25th of April, 1912.

By Mr. Carter:

Q. And I also call your attention to the entry down below there in regard to her condition; what is the word there?

191

A. Dry, soundings are dry.

Q. After loading part of her cargo at San Juan where did you go then?

A. Arecibo.

Q. From the time you left San Juan until you arrived at Arecibo what was the condition of the steamship?

A. Good condition, good seaworthy condition.

Q. Were the tests made the same as previously?

A. Yes, sir, made each day.

Q. During that time was there anything discovered that the ship was leaking when you were leaving San Juan, up to the time of your arrival at Arecibo?

A. No.

Q. At Arecibo do you lie at the dock or do you lie out in the roadstead?

A. Out in the roadstead.

Q. There do you have sufficient water underneath the ship?

A. Yes, sir, nine fathoms.

Q. After finishing loading your cargo at Arecibo and before starting to go to her destination, which I believe was Philadelphia, was it not?

A. Yes, sir.

Q. Look at the log and tell me what was the draft of your vessel forward and what was the draft of the vessel aft; read off under the entry of that date?

A. April 27, 1912, ship's draft forward 24 feet 10, aft 25 feet 9.

Q. What do you find was the condition of the vessel before you started on the voyage?

A. She was dry; soundings were dry.

Q. You mean also, do you, that the tests of the soundings were the same as made on the previous voyages from the different ports?

A. Yes.

Q. After you were loaded at Arecibo ~~you~~ started on your voyage to Philadelphia?

A. Yes.

Q. Look at the log and tell me what time you started from Arecibo bound on your voyage?

A. 8.25 P. M. (referring to log).

192 Q. What day?

A. 27th of April.

Q. After you started out on your voyage what kind of weather did you encounter?

A. We had fresh gale and heavy sea, fresh northeast gale.

Q. Can you testify as to the condition of the weather you met from the time you left Arecibo until you returned back to Porto Rico without looking at your log?

A. I can't very well forget it, you know, but you can read it in the log.

Q. Outside of the log could you tell as to what weather conditions you encountered from memory?

A. No, sir, not just exactly; things might happen that I forget.

Q. Look at the log and tell us the condition of the weather you met from the time you left Arecibo at 8.25 P. M., April 27th, up to the time you returned back to Porto Rico; from the time you turned back?

A. 4 A. M. on April 28 fine and clear, strong N. E. breeze, rough sea; ship rolling and pitching, heavy seas fore and aft, decks continually filled with water.

Q. Take it at 8 o'clock in the morning?

A. 8 A. M. strong E. S. E. wind, high seas, continually filling decks fore and aft with water.

Q. About 4 o'clock in the afternoon what was it?

A. 4 P. M. wind and sea abating.

Q. Does he say anything about the decks?

A. Yes, sir.

Q. What does it say?

A. I don't know what that word is there (indicating).

Q. He has it "debating"; he means abating?

A. Yes, sir.

Q. What about the decks?

A. Decks continually filled with water, ship laboring heavily.

Q. Have you got an entry in there of the same date, April 28, in regard to when you first discovered that the ship was leaking, and if so, what time does it state there?

A. Yes, sir, 7.35.

193 Q. Read what that entry is?

A. 7.35 P. M. discovered No. 3 and No. 4 contains seven feet of water.

Q. What orders were given then about what to do aboard your ship by you, when that was discovered?

Mr. McGrann: Let him testify to what orders he gave; I object to him reading the entry for that.

Mr. Carter: He may not remember.

Mr. McGrann: Then I don't think he is qualified to answer.

Q. Without looking at the log, after you discovered the leak can you tell what orders you gave aboard your ship as to what to do?

A. Yes.

Q. What did you do?

A. I started all pumps going and I kept constantly sounding the pumps and also stopped the ship right where she was.

Q. What time was it you stopped the ship, can you tell without reference to the log?

A. It was perhaps fifteen minutes after we discovered the leak.

Q. What did you do after that, the next day, what, if anything, did you do, on the 29th of April?

A. I will give it just as it happened.

Q. Yes, go right on.

A. We let the ship lay there until we found out whether the water was increasing on us or not, and at about 9 o'clock we found the water was increasing fast and we got our life boats ready.

By Mr. Kneeland:

Q. That was P. M. on the 28th?

A. Yes, sir.

By Mr. Carter:

Q. What did you do in regard to turning back again and
194 going back to port?

A. When we found that the water was not gaining on us so fast but what we could keep it clear we turned around and started for San Juan.

Q. What day was that?

A. That was in the morning.

Q. The next morning?

A. Yes, sir.

Q. The 29th of April?

A. Yes, sir, some time about 5 o'clock A. M.

Q. Then was the course of the ship changed for San Juan?

A. For San Juan, yes, sir.

Q. What were you doing with your pumps?

A. The pumps were constantly going.

Q. What about the workings of the pumps; what do you say about that as to their condition?

A. They were in good condition and were throwing water well.

Q. What kind of weather were you experiencing on your return back to San Juan?

A. Similar weather, strong N. E. gales and high sea.

Q. Are you sure it was N. E. wind?

A. If I remember, or E. N. E.

Q. Which would be better as to direction of the wind, your memory to-day or the entry in the log?

A. The log would be better.

Q. Look at the log under date of April 28, about 5 o'clock, and see on your return back what the direction of the wind was; also, Captain, I call your attention to the fact that if your memory is not clear upon any of the conditions of the weather or anything happening on board of your ship you have the right, of course, to refer

to the log; don't take any changes on any guess-work.

A. At 4 A. M. E. S. E. it says; moderate E. S. E. (referring to log).

Q. Now, then, how about in the afternoon on the 29th around about 4 o'clock; what were the weather conditions?

A. It says here, 4 P. M. fine and clear, strong E. S. E. breeze,
195 rough sea, decks flooded with water, ship rolling and laboring heavily, pumps continually going.

Q. How about the evening of the 29th of April around about 8 o'clock, how were the weather conditions then?

A. At 8 P. M. the wind and sea continued the same.

Q. How about the pumps, what were you doing with them?

A. Pumps continually going.

Q. On the 30th of April, 1912, what were the weather conditions and how was the ship acting?

A. At 4 A. M. clear and fine, strong E. S. E. breeze, heavy head sea, decks continually flooded with water, ship rolling and laboring heavily.

Q. About 8 o'clock in the morning of the 30th of April, 1912, what was done aboard the ship in reference to her engines, if anything?

A. 8 A. M. water gaining on pumps; ordered ship's engines to be drove as hard as possible to enable ship to reach port before sinking and for the safety of ship and cargo; weather cloudy, strong E. S. E. breeze, and rough head sea, decks continually filled with water.

Q. What about the pumps?

A. Pumps continually going, water gaining on pumps.

Q. What time does your entry in the log show that you made Morro Castle?

A. At 4 P. M. wind and weather continue the same, pumps going, water gaining; 6.13 P. M. Morro Castle abeam; 7.03 P. M. came to anchor in San Juan, Porto Rico, with 13 feet of water in No. 3 and 4 hold, pumps continually going; midnight fine and clear; pumps gaining on water.

Q. When it was discovered at 7.35 in the evening of the 28th of April that there was water in No. 3 and 4 hold did the ship's carpenter do anything in regard to taking the soundings in the vessel?

A. She was sounded at the proper time.

Q. Were the reports made to you?

A. Reports made to me and the chief officer.

196 Q. After arriving back at San Juan what was done in regard to getting the water out of the vessel with the ship's pumps or with any other pumps that were to be procured, what was done?

A. We had to bail most of it with coal tubs; we rigged two wrecking pumps and neither one of them would work, couldn't get them to work, the water was so thick.

Q. What was that caused by?

A. Sugar and gas stopped that up.

Q. From the time that you discovered the leak in the vessel, April 28, at 7.35, what do you say in regard to the pumps working on your steamship; was there any difficulty getting the water through the pumps?

A. No, sir, the pumps worked all right.

Q. While lying at San Juan did you do anything in regard to engaging a diver to find out where the leak was?

A. Yes, sir.

Q. What did you do?

A. We lighted it—the first thing we did was to lighten some cargo, lighten the stern up so the diver could get under the bottom.

Q. Did you do that?

A. Yes.

Q. After you did that what did you do about getting the diver?

A. Then we put a diver down where the sugar melted away first, where the sugar would fall; the empty place where the sugar would slide, we put the diver down there, and that is where he discovered the leak.

By Mr. McGrann:

Q. I understand the diver went down on the inside first?

A. On the outside; wherever water came in, the cargo would melt and slide right down; that is where we could locate the leak.

197 By Mr. Carter:

Q. What did you do before the diver went down there to find the leak in regard to anything about the ceiling; what did you do with the ceiling of the vessel so as to get at that leak?

A. After the leak was found and the hole plugged then we pumped the vessel out, pumped out and bailed out.

Q. Before the diver went down there what did you do to reach that hole; did you do anything with this ceiling?

A. No, sir.

Q. Are you sure of that, look at your log; don't trust to your memory; when you can't remember say so?

Mr. McGann: I object to the witness changing his testimony to conform to the log; the witness has testified he did nothing, and it seems to me that should stand.

Q. You made a statement when I asked you in regard to what you did in regard to the ceiling before the diver went down to find out about the leak, and you said nothing; look at your log and see if you have made an error in your statement in regard to what you did?

A. If you will let me explain it; that was after the water was out of the ship.

Mr. Kneeland: They couldn't touch the ceiling when the ship was full of water.

Q. After you got the water out of the vessel—do you know what

hold you got it out of, what hold it was?

A. No. 3 and 4 hold is in one.

Q. You got her dry?

A. We got the water pumped out and bailed out dry; then we cut the ceiling away; then we got the plate, the diver explained what kind of a hole it was, then we got the plate and rubber
198 gasket and put the plate on the outside and bolted it through and the rubber gasket inside; bolted through and screwed it tight and cemented all over.

Q. Did you find the leak yourself?

A. The diver found the leak.

Q. Did you explain to the diver where the leak could be found?

A. Yes.

Q. What did you say?

A. I chalked the line off on the deck and put rope under the bottom where I thought it was, and he went down and found the leak about where I said it was.

Q. Where was the leak?

A. It was on the starboard side about six feet abaft the No. 4 coaming; and if I remember right, it was four feet about from the keel.

Q. Were your pumps kept going right along?

A. Constantly going.

Q. After you got 3 and 4 clear of water and the leak stopped then what did you do with the cargo?

A. Cleaned the hold out of all empty bags, piled them up in No. 3 and stowed the cargo; took cargo from the forward hold and shifted it aft to get the ship in trim.

Q. After that you reloaded the cargo?

A. Yes, that was reloading the cargo.

Q. Did you go down and see where the leak was yourself?

A. Yes.

Q. When you were down there did you notice the cement that was in the ship?

A. Yes.

Q. What was the condition of the cement forward and aft of the hole that you found?

A. The cement was lifted from the bottom of the ship.

Q. What do you mean by lifted from the bottom of the ship?

A. I mean there was no cement there; it was lifted up.

Q. Could you tell from your examination of the condition
199 as it appeared to you at that time what would cause that condition?

Mr. McGrann: Objected to; he is not qualified to answer.

Q. (Repeated.) Could you tell from your examination of the condition as it appeared to you at that time what would cause that condition; what would cause the condition of the cement, that is, the lifting that you stated, what would cause that?

A. It was my opinion that anything that made a hole through the side, caused this hole, and it was left there until we got out to sea,

where the sea would work it, and then it dropped out.

Mr. McGrann: I move that the answer be stricken out as not responsive.

Q. You say you went down and observed near the leak this cement lifted?

A. The cement had lifted on the forward part of the leak and on the after part of the leak, of this hole; in fact there was no cement there.

Q. What caused the removal of the cement?

Objected to.

A. It was in my opinion something penetrated the side and made the hole and lifted that cement and loosened it.

Q. From your experience as a master mariner could you tell whether or not the fact that the lying aground at San Juan would have any effect upon that cement as you observed it?

A. Not lying on the smooth bottom without she laid on something that made a hole through it.

Q. If she lay on something that made a hole through the plate, as you found the hole about 4 to 6 feet from the keel, would that have occasion to leave the cement in the condition in which you saw it?

200

A. Yes, sir, if anything stuck through her bottom, pierced her bottom and remained there, lifted the cement and then remained there until she got out where she was in a seaway and then dropped out, that would cause it.

Mr. McGrann: I object to the testimony as being speculative and not founded upon any fact that has been established.

Q. How long had you been going to sea up to April, 1912?

A. About forty-three years.

Q. Have you been in all classes of vessels?

A. Yes.

Q. Have you been in vessels where cement has been used in the ship?

A. Yes, sir.

Q. You say that you saw this hole in the plate of the vessel?

A. Yes.

Q. Now, from your observation of that hole can you tell whether or not the puncture was made from the outside or inside of the vessel?

A. Made from the outside from the appearance of the hole.

Q. How do you determine that?

A. Because it was dented in; the edges were dented in.

Q. How do you account for the fact that while loading at San Juan, as you stated, that she was aground on the 25th of April loading there, went to Arecibo, loaded there, and then starts on her voyage to Philadelphia, and up to the time of the discovery of the leak on the 28th, about 7:35 P. M., that vessel didn't leak during the interval between leaving San Juan, arriving at Arecibo, and up to the time the leak was found; how do you account for that?

A. Well, I think while she was aground at San Juan she lay on something that made that hole.

201 Q. Why didn't it come out?

A. It could remain there and then come out after we got in the seaway, the ship rolling; that is the only thing.

Mr. McGrann: Objected to as a conclusion based on no sufficient fact.

Q. Could the steamship have the same hole in her that you discovered on your return back to San Juan and after the cargo was discharged, from the time of leaving New York on April 13, bound for Porto Rico?

A. No, sir.

Q. What was the size of this hole in the plate; describe it?

A. I don't remember; I think it was an inch and a half; it wasn't perfectly round, it was an oblong; maybe an inch and a half long and three-quarters of an inch wide if I remember right; an inch and a quarter; an inch and a quarter or inch and a half long; that is fore and aft, and just about half an inch if I remember right.

Q. What do you say about the suction pipes that are in the steamer Julia Luckenbach?

A. The suction pipes were all right and in good order.

Q. What about the rose boxes or strainers?

A. They were all right.

Q. What do you say as to whether or not the rose boxes and strainers were sufficient in number for a ship of her size and class?

A. Yes, sir.

Q. Were they?

A. Yes.

Q. And also the suction pipes?

A. Yes.

Q. Had you while master of that steamer experienced any trouble with those pumps or strainers or rose boxes?

A. No.

Q. Before you were master of that steamer Julia Luckenbach had you ever been on her before that as officer?

A. Yes.

Q. What position?

A. Chief officer.

Q. Do you know how long it was before 1912, April,

202 you were chief officer?

A. I think it is nearly six years.

Q. Do you remember at the time you were chief officer of her whether or not the steamship Julia Luckenbach had the same number of suction pipes, rose boxes and strainers she had on April 13, when you were master of her?

A. I don't remember that; I don't remember

Q. Was there anything to indicate to you from the time of lying at San Juan and loading and leaving to go to Arecibo, and while there at Arecibo loading, and up to the time you started to go on

your voyage, was there anything to indicate to you or show that the ship was leaking?

A. No, sir, nothing; the soundings didn't show any water.

Cross-examination by Mr. McGrann:

Q. You took regular soundings after leaving San Juan up to the time of discovering the leak?

A. Yes.

Q. Are you quite sure; do you recall that they were reported to you by the carpenter?

A. Yes, I am sure of it; that is the rule; three times a day.

Q. Do you remember of your own memory?

A. Yes.

Q. Without reference to any log?

A. Yes, I remember without referring to the log at all.

Q. You are quite sure that the carpenter took soundings three times a day after leaving San Juan?

A. I didn't see him each day, but I almost always am up around the bridge when he is sounding; that is the first thing he does in the morning.

Q. Do you remember seeing him taking any soundings?

A. Yes, I couldn't remember the date, but I saw him sounding every day.

Q. What is your carpenter's name?

Mr. Carter: I am going to call him.

203 Q. Where are the sounding tubes in No. 3 and 4 hold?

A. One on the port side and one on the starboard side.

Q. That sounding tube comes right down to the keel amidships?

A. That goes each side of the keel.

Q. It is amidships?

A. Yes, sir.

Q. Near the mainmast?

A. Yes, sir.

Q. That is all an open bottom?

A. Yes; she is not a double bottom vessel.

Q. How does he take those soundings; by a rod?

A. By a sounding rod; he chalks the sounding rod first.

Q. Were there any conditions of weather there that prevented him from getting a good sounding in that time, from the 25th, 26th or 28th of April?

A. He could get soundings right along.

Q. Nothing to prevent him getting soundings?

A. He could get soundings every day by watching his chance.

Q. You feel quite sure that he got soundings?

A. I know that he got soundings.

Q. And you got no report of water?

A. No report of water out of the ordinary.

Q. He did report a little water?

A. No, there is always—you can't get water out of the ship less

than half an inch; I won't say the ship would be perfectly dry because anyone, a sailorman would know better.

Q. Do you keep any record in your logbook of what soundings are actually found?

A. We don't generally keep—if it goes along dry, right along dry we mark it dry.

Q. If it is two or three inches would you call it dry?

A. Say one inch—if there is one inch or one inch and a half the pumps wouldn't catch it; they couldn't pump it.

Q. Is there anything in your logbook from the 26th of
204 April to the 28th of April, 1912, that would indicate how much water, if any, you found to be in the bilge of 3 and 4 hold?

A. She had no bilge; the bottom of the ship.

Q. On the bottom; I call that the bilge; is there anything in your logbook; you can refer to the logbook and see if there are any entries as to how much water, if any, was found from the 26th to the 28th of April in No. 3 and 4 hold exclusive of the 7 feet you have there; I want from the time the ship left San Juan up to the time you discovered the 7 feet of water you noted in the log?

A. Yes, there is some inches here.

Q. Will you read them from the log with the date?

A. 26th hold soundings and temperature it says: No. 1 hold 9 inches; No. 2 hold 2 inches; No. 3 hold 7 inches; No. 4 hold 7 inches; that is on the 26th, 6 A. M.

Q. Is that the only entry which appears in the log, just 6 A. M.?

A. Yes.

Q. What is the entry below that, dry; what does that mean?

A. That is supposed to mean the temperature of the hold, but we have never taken a test of the hold, but these are soundings (indicating).

Q. Refer to the next day in the log, the 27th, and read the same?

A. Nine inches in No. 1; nothing in No. 2; nine inches in No. 3; nine inches in No. 4; that is the time of sounding, but the pumps were put on and then pumped right out.

Q. On the 28th at 6 A. M.?

A. No. 1 hold ten inches; No. 2 hold four inches; No. 3 hold ten inches; No. 4 hold ten inches.

Q. And the entry for the 29th is what at 6 A. M.?

A. Ten inches in No. 1; No. 2 hold five inches; No. 3 and 4 pumping.

Q. If there had been any increase in the water after 6 A. M. on those dates, that is the 26th and 27th, would you have
205 entered that also?

A. If there had been any increase before we——

Q. Above what is entered?

A. Oh, yes, sir, it would be entered.

Q. What I want an explanation of is, you have entered only the soundings at 6 A. M., yet you have testified you took three soundings a day?

A. Yes, sir.

Q. Do I understand at 6 A. M. the sounding as recorded is the maximum per day?

A. It is the sounding the carpenter gets.

Q. You won't certify from your practice aboard ship that was the highest sounding for the day?

A. No, sir.

Q. What would you do if at 4 P. M. you got more water: wouldn't you enter it in the logbook?

A. The pumps are put on if there is any more; if we found any extra water in the ship we put the pumps on and pumped it out.

Q. Would you enter it in the log?

A. We enter the soundings the carpenter gets; that is the amount of water he gets.

Q. You didn't get any soundings there beyond what you have read off from your entries in excess of this, I understand, until 7.35 P. M., when you discovered seven feet of water, is that right?

A. Yes.

Q. Who reported that to you first?

A. One of the engineers reported water coming through the shaft alley, running through the shaft alley.

Q. The chief engineer, according to his testimony, logged that as 6.40 P. M. He said in his logbook "Discovered shaft alley full of water at 6.40 P. M.." and he testified he notified you immediately, and in your log I see you have "7.35 P. M., discovered seven feet of water": was it before that you discovered the water or was it when you got the particular seven feet?

206 A. That is the way it was reported to me by the deck time; there are two times aboard the ship, engine room time and deck time.

Q. There would hardly be an hour's difference in the time; can you reconcile those two entries, the entry in your engineer's log and the entry in your deck log as to the time when this water was discovered?

A. Well, I couldn't; we didn't take any account of the engine room at all.

Q. It was 7.35 by your deck time?

A. By the deck time.

Q. And the carpenter would have taken the sounding at 4 o'clock that afternoon?

A. 4 o'clock.

Q. Did you instruct the chief engineer to make any entry of this grounding at San Juan in the logbook?

A. I don't remember about that.

Q. You don't recall saying anything to him about that after the leak was discovered?

A. Of course we talked it over but it has been a year ago.

Q. You don't recall instructing him anything about any entry in his logbook as to the grounding at San Juan?

A. I don't remember about that; of course we keep two separate

logs, the engine room log and the deck log.

Q. I understand that you discharged part of your cargo on this particular voyage at Ponce and part at Aguadilla?

A. Ponce was our first port.

Q. You took out part of your cargo there?

A. Yes.

Q. And you completed the discharge at Aguadilla?

A. I think it was Aguadilla; I think we took it all out at Aguadilla, I don't think we took any to San Juan.

Q. You must have entered San Juan light?

A. Yes.

Q. Did you have any ballast?

A. We carried seventy-five tons of ballast.

Q. Where?

A. Aft.

207 Q. Where was that, in the after peak?

A. Right in the lower hold right aft, No. 4 hold.

Q. What character of ballast was it?

A. Iron dross.

By Mr. Kneeland:

Q. Slag?

A. Yes.

By Mr. McGrann:

Q. How high?

A. It was probably—they had kind of a bulkhead put up and a bin made for it so it lay in snug; I should think three feet high.

Q. Was this bin—was there a wall of the bin right athwartships?

A. Yes.

Q. It extended completely athwartships from one side to the other?

A. From the shaft alley across to the bilge.

Q. On each side of the shaft?

A. Yes, sir.

Q. How far forward of the after peak bulkhead was that wall of the bin; do you understand the question?

A. No.

Q. What I want to get at is how much of the length of the hold did this ballast cover?

A. I should think it was ten—perhaps fifteen feet; any way we had to remove it to get at the ceiling; to get at this leak.

Q. In other words the leak you afterward discovered was underneath the ballast?

A. Right—nearly on the edge so we had to shovel it back to cut the skin out.

Q. Do you know what your tons per inch is on the Julia Luckenbach?

A. I used to allow about 27; 2,240 pounds; 27 roughly.

Q. Did you have any ballast tanks on?

A. No, sir, of course we had fresh water and that boiler water

was carried across abaft the engine room, the cofferdam.

208 Q. There is a tank there?

A. Yes.

Q. Do you know the capacity of that tank?

A. That would carry probably 150 tons of water.

Q. You had water in there when you went in San Juan?

A. Yes, always carry water there.

Q. Didn't you have some of the same ballast up forward on the ship?

A. No, sir, only aft.

Q. That was the only place?

A. Yes, that was to keep the ship by the stern; she loaded by the head.

Q. She ordinarily trimmed by the head?

A. Yes, sir.

Q. How about aft; what was in your after peak compartment?

Mr. Carter: The claimant objects to this line of examination on the ground it is not pleaded in the libel or pleaded in the answer of the Insular Line, not within the issues, and on the further ground that if the witness' examination continues along this line the Insular Line makes the witness its own.

Q. (Repeated.) How about aft; what was in your after peak compartment; that is the compartment just aft of No. 3 and 4 hold?

A. In what we call the peak?

Q. Yes.

A. I think it was empty.

Q. Do you ever carry cargo there?

A. No.

Q. What is it used for, ship's stores?

A. Not used for anything; nothing there.

Q. It is quite a big space isn't it to go unoccupied?

A. It is not so large, the after peak; I don't remember just how she was but I know we didn't carry anything there.

Q. How long is the Julia Luckenbach, do you remember, 313 feet?

A. Somewhere about 313.

209 Q. About thirty-eight feet beam or more?

A. I think she was more; I couldn't tell without looking at the book.

Q. What is her ordinary loaded draft?

A. She loads 26 feet; 25 feet, 26 feet she is loaded.

Q. What is she light?

A. About 16 feet 6 I think it is.

Q. Is that mean?

A. That would be mean; it all depends on the bunker coal but I should judge about 16 feet 6, or 17 feet.

Q. When she is light how does she trim, by the head?

A. By the stern.

Q. She wouldn't be much over 17 feet by the stern when she is light?

A. I should judge she would be 17, 17 foot 6.
Q. Which side did you lie at Quartermaster's Dock at San Juan?
A. Port side to the wharf.
Q. Port side to?
A. Yes.
Q. Quartermaster's Dock is simply a bulkhead; it doesn't project out into the harbor?
A. It is a bulkhead along the shore, along the water front.
Q. Your bow was to the eastward port side to, away from the entrance to the harbor any way?
A. Yes, sir.
Q. And what other docks are there there or wharves or piers, whatever you choose to call them?
A. Well, at that time there was only one pier besides that new pier No. 2.
Q. Who has charge of that, who owns that?
A. I couldn't tell you.
Q. Haven't the New York & Porto Rico Steamship Company a pier?
A. Yes, they had a pier.
Q. Isn't there one just abreast of that pier?
A. There is one just up from that.
Q. Those two were there when you were there?
A. Yes, then this Quartermaster's Dock.
Q. The Quartermaster's Dock is the one with the deepest
210 water?
A. No, Quartermaster's Dock is the shoalest water.
Q. Which one has the deepest water?
A. The new dock, the Porto Rico Dock.
Q. The New York & Porto Rico Steamship Company?
A. Yes, their dock, and the new dock No. 2 they call it, the Insular Dock.
Q. You are quite sure that both of those have the deepest water?
A. Yes, the deepest water.
Q. What do you think the water is alongside Quartermaster's Dock?

Mr. Carter: Objected to as incompetent and immaterial on the ground that the Insular Line being the charterers of the vessel ordered here there; they had control and possession of the vessel in arriving and sending her to a dock under the charter party where she must remain afloat; and on the further ground that it is not pleaded in the answer of the Insular Line in regard to any depth.

Q. (Repeated.) What do you think the water is alongside Quartermaster's Dock?
A. I suppose—I couldn't tell you just how much water there is there.
Q. You never sounded?
A. I go wherever they order me and they are supposed to give me a berth where there is plenty of water.

Q. You don't make any inquiries yourself at all?
A. At times when I find there isn't water enough for the ship.
Q. You had been into San Juan many times before this, hadn't you, captain?
A. Yes, sometimes.
Q. Hadn't you ever been at the same dock before?
A. Yes, but not to take in as much cargo as we had.
211 Q. You had been in the same dock with the Julia Luckenbach?
A. Yes, but when I was officer of the Julia Luckenbach we would only go there to take small lots of cargo; they used to send us around the island for cargo.
Q. What were you on before you went to the Julia Luckenbach, what steamer?
A. I was in the Mallory Line, chief officer of the Lampassas.
Q. She never went into San Juan?
A. No, sir, she went to Galveston.
Q. What ship have you been in to San Juan besides the Julia Luckenbach?
A. I have been there in the Jacob Luckenbach; I have been there in the F. J. Luckenbach, but not to load at Quartermaster's Dock; the cargo we took in was at No. 2.
Q. How do they compare with the Julia Luckenbach as to draft; are they deeper or lighter?
A. I should say they are lighter draft.
Q. Can you tell me how much cargo you loaded at San Juan?
A. I don't remember only somewhere about 18,300 bags; something like that.
Q. How much did you load at Arecibo?
A. If I remember right it was 15,000.
Q. Can you refresh your memory from your logbook; have you got it in your logbook?
A. It doesn't give it; we don't have anything to do with counting the cargo or signing the bills of lading or anything like that.
Q. You don't enter it in your logbook?
A. No.
Q. At any rate you didn't fill her in San Juan?
A. No, we had a little room.
Q. Have you entered in your logbook the draft of the ship when you left San Juan?

Witness refers to log.

Q. That was on the 25th or 26th?
A. No, sir.
212 Q. What is the last draft you have entered in the log prior to the 26th of April?
A. This is the draft in Arecibo, leaving Arecibo, 24 feet 10 inches forward and 25 feet 9 inches aft.
Q. That was after you took on the cargo at Arecibo?
A. Yes.
Q. I want you to refer back in your log and give us what is the

last entry of the draft before that?

A. I don't think he has put the draft down (referring to log); he has not put the draft down.

Q. Do you mean to say you have entered only in this logbook the draft you had when you left Arecibo?

A. We enter in the log the draft we sail, loaded; that is from the loading port, and generally put the draft down on arrival.

Q. Can you tell me what the draft was when you left San Juan from your own memory; do you know whether any observations were made of the draft?

A. If I remember right we were loaded to 21 or 22 feet; if I remember right.

Q. That is the best of your memory?

A. Yes, sir.

Q. You put down in your log, I understand, you found the ship to be aground at 10.15 P. M.; how was that discovered?

A. That was on the low tide.

Q. That may be, but I want to know how you discovered that you were aground just at that time, 10.15?

A. By the stevedores working; they were working four hatches.

Q. I want to know what made you know your ship was aground just at that particular time, 10.15, is that just the tide; you knew it was low tide then, or was there something that made you know you were aground at that time?

A. It was a very low tide.

Q. What is the rise and fall; it is very small in San Juan, isn't it?

A. Sometimes a foot and eight inches, a foot and a half.

213 Q. Do you think it is that much?

A. Yes, indeed.

Q. To return to this question; I would like to know why it is that you made this entry in the log of that specific time, 10.15, that you found you were aground?

A. Well, there was—I can say one thing, because the vessel didn't settle any, didn't change her draft any, and then again the tide went out very low; sometimes it goes out lower than others.

Q. You knew at 10.15 you were aground?

A. Yes, or at about that time; it was reported to me at that time.

Q. Do you remember any one reporting it to you?

A. That was the general report; the chief officer generally comes to me.

Q. Do you recall that he did come to you and say anything about the ship being aground at 10.15 on April 25th?

A. He must have come to me and reported it; I don't remember, it is a year ago, but he must have come to me or it would not be in the logbook.

Q. At any rate you knew she was aground before you finished loading?

Mr. Carter: Objected to as incompetent, not within the issues not pleaded in the answer and also the libel.

Q. (Repeated.) At any rate you knew she was aground before you finished loading?

A. Well, you know a man who is used to a ship, right aboard a ship all the time, he can readily tell when the ship is touching the bottom; there is always something to show, either a little list or something to show that the ship is touching the bottom.

Q. I want to know whether you knew before you finished loading that ship at Quartermaster's Dock, whether or not the ship was aground?

214 Mr. Carter: Same objection, on the same grounds and on the further ground that the ship being under charter to the Insular Line, the respondent, they designated the dock and continued loading the vessel and no fault can be charged against the ship for lying there.

A. Yes, I knew the ship was aground.

Q. And at 1.15 A. M., on the 26th, you finished loading, according to your logbook?

A. Yes.

Q. She was still aground, was she?

A. No, sir.

Q. She had floated?

A. She was floating.

Q. She was floating when you finished loading?

A. She was floating.

Q. How long was she aground all told that night?

A. I couldn't say; I suppose she was on the bottom perhaps two hours; perhaps an hour.

Q. Perhaps an hour or perhaps two hours?

A. Or an hour and a half; I couldn't tell exactly.

Q. Did you do anything to relieve the condition?

A. We went right out, we left the dock and went right out.

Q. I mean while she was aground did you continue loading, taking on more cargo and sinking her deeper?

A. I don't remember about that.

Q. You have an entry of 1.15 A. M. finished loading?

A. I remember they hauled the ship off from the dock a little way.

Q. That is, breasted her off?

A. A little bit.

Q. How far off the dock?

Mr. Carter: Objected to on the same ground as previously stated.

Q. How far off the dock would you say she was?

A. Just out to the skids—not beyond the reach of her skids.

215 Q. You didn't touch anything at Ponce, did you, before you went to San Juan?

Mr. Carter: Objected to as incompetent and not within the issues, and on the ground previously stated.

Q. (Repeated.) You didn't touch anything at Ponce, did you, before you went to San Juan?

A. Not to my knowledge.

Q. At Aguadilla, did you go inside at Aguadilla or did you lie outside?

A. Lay outside in eleven fathoms of water.

Q. The engineer testifies that you had touched at one or two places, as I remember; do you disagree with that?

Mr. Carter: Objected to as not properly stating what the chief engineer testified to; my recollection is the chief engineer didn't testify she touched at any other place.

Q. Do you say she didn't touch at any other place?

A. Not to my knowledge.

Q. Did you take any soundings around the ship when she was——

Mr. Carter: Objected to on the same ground as previously stated.

Q. —at Quartermaster's Dock?

A. No.

Q. You don't know what draft by observation she had at that time?

A. No, sir.

Q. You think it was between 21 and 22 feet?

A. Between 21 and 22.

Q. When she finished loading at San Juan?

A. I think so.

Q. I show you a chart of San Juan of the Army Engineers; is this Quartermaster's Dock (indicating)?

216 A. Yes, that should be it right there (indicating).

Q. That is the location?

A. That is the location, yes, sir; the Quartermaster's Dock ran that way, you see (indicating).

Q. Will you mark what you have indicated as Quartermaster's Dock by the letters A B.

Counsel for claimant ask counsel for the Insular Line when that chart was made, and by whom.

Mr. McGrann: The chart bears the official signature; it is a print of the official chart of the Engineer's Corps of the Army.

Mr. Carter: When was it made?

Mr. McGrann: It is approved December, 1911, and it appears it was after the completion of dredging, February, 1911.

The Witness: That is supposed to be it right there.

The place is marked with the letters A B.

Q. And you were lying with your bow pointing to the eastward this way away from the entrance?

A. Yes, sir.

Q. That is, your bow would be approximately at the point B?

A. Yes, sir.

Q. And your stern would be approximately near A, is that correct?

A. Yes.

The chart is offered in evidence.

Objected to as incompetent and not properly proven to be correct soundings at the time the Julia Luckenbach lay at the dock, and also not correctly showing the soundings up alongside the dock and the position that the ship occupied up alongside the dock and off the dock.

217 The chart is marked Insular Line Exhibit B of April 5, 1913.

Q. That is a mud bottom, isn't it, in the harbor in San Juan?

A. Well, I should judge it was sand and mud.

Q. I understood you to say on direct examination that the ship resting on that bottom could not injure herself; it would be necessary to have some object, such as you think penetrated the Julia Luckenbach, to cause her injury?

A. That is what I think.

Q. You would not have gone up to the berth if you thought it was an unsafe place to take your ship?

A. No, sir, not if I thought it was unsafe.

Q. You would not have taken your ship there, would you?

Mr. Carter: Objected to as incompetent and on the grounds previously stated, and on the further ground the ship was ordered by the charterer to that dock and selected by them, and no notice given to the master of the ship that the depth of water was not sufficient to permit the ship to always lie afloat.

A. No, sir.

Q. What time do you think it was low water at San Juan on April 25, 1912?

A. It was about 10, I think; somewhere along there, about the time we were aground.

Q. Are you still in the employ of the owners of the Luckenbach?

A. I am master of the Harry Luckenbach.

Q. That is the same owners?

A. Same agents.

Q. Do you know when the Julia Luckenbach went on charter to the Insular Line?

A. No, sir.

218 Q. You said you saw the hole itself; when did you see that hole in the bottom?

A. When she was hauled out on the dry dock.

Q. Didn't you see it while you were down in San Juan?

A. I saw what I could of it on the inside while they were fixing it up.

Q. Did you see any signs of bending or buckling of the plates adjacent to the hole?

A. What I could see it looked like a hole punched, the edges

turned in, a hole punched right through; a sharp substance.

Q. Were you right there where you could put your fingers on the edges at San Juan did you get that close to it?

A. Not San Juan, because there was such a pressure of water we couldn't examine it.

Q. This plug was hammered in, from the outside in, by the diver?

A. Yes, when he stopped it temporarily.

Q. Did you notice then the leak, how thick the plate was at the flare where it was turned in?

A. I didn't look at the inside.

Q. You don't know how thick the plating was at the hole?

A. I couldn't tell.

Q. Was this sugar that was damaged surveyed down there at Philadelphia on your discharge of it?

A. I suppose it was.

Q. You don't remember what condition it was in when they broke it out, do you?

A. The sugar that we stowed back in No. 4 hold, that came out in good order.

Q. What did you do with that sugar which was damaged by the water?

A. Got the bags together and piled them up under No. 3 hatch.

Q. At the top?

A. Right down in the hold, right across ship, and cleaned No. 4 hold out and restowed the cargo there.

219 Cross-examination by Mr. Kneeland:

Q. This was your first trip on the Julia Luckenbach?

A. Yes.

Q. What day did you join her, do you remember?

A. I have to look at the log.

Q. You joined her in New York?

A. Yes.

Q. You succeeded Captain Pennington?

A. Yes; I think the day before she sailed from New York.

Q. That is, on this voyage out to Porto Rico?

A. Yes.

Q. She was loaded when you went out?

A. Yes.

Q. Was she loaded when you joined her?

A. Yes, she was loading.

Q. So you never had any opportunity to make any examination of her interior arrangements or her holds?

A. Not until after the accident; not until she was discharged in San Juan.

Q. Do you know what suctions she had in No. 3 and 4 holds?

A. Yes.

Q. How many?

A. She had four.

Q. When did you discover those?

A. When the ship was discharged, at every discharging port we generally looked at the suctions before we loaded again; always make a practice of that.

Q. You didn't do that?

A. Always do that when we get a chance; look at the suctions.

Q. I am referring to you as master?

A. No, sir, the carpenter and chief officer.

Q. You don't attend to that?

A. No.

Q. That is not part of your duty?

A. No, sir, it is reported to me.

Q. You yourself had never made any examination of those matters at all?

A. Yes, in this case I was down myself and looked at her in San Juan.

Q. What did you see at San Juan?

A. I saw that the suctions were all right.

Q. Did you see the ceiling raised; was the ceiling raised?

220 A. Yes; we have a plank that we take up and clear out around the suctions.

Q. How many of those did you see raised?

A. All four.

Q. Where were the after ones; there were two near the bulkhead, were there not; two near the bulkhead which divides the engine room from No. 3 hold?

A. I couldn't say about the suctions at the engine room bulkhead. I speak of the suctions No. 2 and 3; there are four suctions, one on each side.

Q. What do you mean by suctions 2 and 3?

A. 2 and 3 hold; she is a single bottom ship and instead of being wing suctions they are midship suctions.

Q. When you say 2 and 3 you mean in No. 2 hold?

A. Yes.

Q. That is forward of the engine room?

A. I mean No. 4.

Q. You mean 3 and 4?

A. 3 and 4 holds.

Q. There were four of them?

A. Yes, if I recollect right.

Q. One on each side near the engine room bulkhead?

A. No, sir, there was two under No. 4 hatch.

Q. Under No. 4 hatch?

A. Yes, if I remember right.

Q. There were none of them aft of No. 4 hatch coaming?

A. Not to my knowledge the water ran right along the limbers.

Q. You had this water reported and you testified that you stopped your ship, got your pumps going and then started again back to San Juan with your pumps going continuously, and that the pumps acted properly throughout, discharging the normal quantity of water that you could discharge by the pumps; is that a fact?

A. Yes.

Q. When you got back in San Juan then you got outside
221 assistance in the way of additional pumps to get the water out?

A. Yes.

Q. Then you commenced and shifted some cargo, did you not?

A. Yes.

Q. You took the cargo from where, the between decks or 3 and 4?

A. We took it out of the orlop deck and out of No. 4.

Q. That you stowed on lighters?

A. That we stowed on lighters.

Q. After you had got the vessel all cleared out then you put that cargo which had been stowed on lighters back where?

A. Back in No. 4.

Q. And you also shifted some cargo from forward?

A. Yes.

Q. What hatch did that come from?

A. It came from No. 1.

Q. Are you sure of that?

A. The cargo we shifted came from No. 1.

Q. Did you have occasion while you were there to take any cargo out of No. 2 at all?

A. No, sir, No. 2 was not opened, if I remember right.

Q. Are No. 1 and No. 2 all in one or is there a bulkhead?

A. I think there is a bulkhead, if I remember right; I won't say sure.

Q. After you got back in San Juan and got the water down a little, then you judged of the location of the leak by watching where the suction was or where the outflow came, is that right?

A. Before I went to San Juan.

Q. You could see it?

A. Before we——

Q. You could see it sliding down towards that point?

A. Yes.

Q. Then you had a mark made and sent a diver down?

A. Yes, so that the diver would know somewhere near the position.

Q. Did he find it then?

A. He found it, yes, sir.

Q. And was the plug then driven in from the outside?

222 A. The hole was open; the hole in the ship was open.

Q. Did he then at that time drive the wooden plug in from the outside?

A. Yes, just a rough—just a plug with a piece of soft canvas on it to plug the hole up.

Q. Then you pumped out?

A. Then we went to work and I had to bail it out.

Q. After you got all the water all bailed out and your cargo all out and the hold empty you went down and made an examination from the inside, is that right?

A. Yes.

Q. And to make that examination and get at this place you had to shift the ballast?

A. We had to shift some ballast on the starboard side.

Q. On the starboard side?

A. Yes.

Q. That ballast extended on the starboard side and port side originally almost up to the after coaming of No. 4 hatch?

A. No.

Q. How far from it?

A. I should think 15 feet long; I should think about 5 feet abaft No. 4 coaming, and I think we had to remove——

Q. You mean forming the bin in which you had this?

A. Yes.

Q. Was it the same on each side?

A. Yes.

Q. Just the bulkhead forming this bin ran right across?

A. Yes.

Q. In the same position on each side of the ship from the shaft tunnel out to the side?

A. Yes.

Mr. McGrann: What was the five feet?

Q. Do you think it was five feet from the after coaming of No. 4 hatch to that bulkhead?

A. Yes.

Q. And the hole you say was about six feet?

A. About six feet.

Q. Aft of No. 4 after hatch coaming?

A. Yes, sir.

223 Q. So that the ballast was over the place where the hole occurred?

A. Yes.

Q. So long as that ballast remained in the ship in that position there was no opportunity of lifting the ceiling under it, was there?

A. Not until the ballast was removed, a portion of it removed.

Q. There was no opportunity of examining the cement underneath the ceiling as long as that ballast remained in there?

A. No, sir.

Q. Do you know how long that ballast had been in there?

Mr. Carter: Objected to as incompetent on the ground it is not within the issues pleaded by the libel or the answer, that the ballast had any effect on the ship in any way to make her unseaworthy, and that the libel is limited and specifically alleges only defects in the ship in regard to her suction pipes, rose boxes and strainers, and also to the fifth plate from aft and B strake starboard side of the bottom was rusted, worn or corroded on the inside.

A. No, I don't know.

Q. After you had had this ceiling cut away to get down so you could make temporary repairs towards stopping that hole, you said

something about your having found the cement lifted?

A. Yes.

Q. And by lifted I understand you mean there was not any cement there, is that right?

A. That is around this hole forward and aft of the hole I stated.

Q. The bottom of that ship is divided into little pockets or compartments by the floors that go across, and by the frames?

A. Yes.

Q. And this hole was within one of those pockets?

A. Yes, between the two frames.

224 Q. Was the cement gone in that frame or in that pocket?

A. Around this hole.

Q. How far back from the hole itself was the cement gone?

A. I didn't cut away ceiling enough to see.

Q. How much of the ceiling did you cut away?

A. Cut away between the two frames.

Q. But you cut away between two frames so you could see the hole in that little subdivision or pocket in which that hole was, is that so?

A. I don't understand about this pocket business.

Q. The frames divided again by the longitudinals, that made a sort of a little box down there, didn't it?

A. No, these frames go across the bottom of the ship.

Q. There are other pieces that run for and aft?

A. Not in the bottom of the ship, only in the middle of the ship; that is called the keelson.

Q. You saw then only the cement between the two frames?

A. That is all, yes, sir.

Q. Was it gone entirely there?

A. It was broken up on each side of this place.

Q. What I want to know is whether it was still there or whether it had been broken up and washed out?

A. It was gone, washed out.

Q. There wasn't any of the cement left there?

A. There wasn't any around the hole.

Q. That was the only cement you saw on that occasion, wasn't it; you didn't open up any further?

A. I didn't open up any other timbers.

Q. What is the object of the cement?

A. I suppose put in to preserve the iron.

Q. It is very necessary to have the cement in good condition in ships that are carrying sugar?

A. Yes, they look out to have the cement in good condition.

Q. You have been a master for how many years?

A. I suppose twenty years; eighteen or twenty.

225 Q. You have been in the Mallory Line?

A. Chief officer in the Mallory Line, and I have been in sailing ships most of my time.

Q. Have you not found it is the practice on steamers to have the chief officer of the vessel at intervals raise the ceiling and examine the cement to see what its condition is?

Mr. Burlingham: I don't see what that practice has got to do with it.

Mr. Carter: Objected to as incompetent, not being pleaded in the libel or answer of the Insular Line.

A. No it is not the practice more than to take up the ceiling and look at the suctions.

Q. Do you mean that in your experience the only parts of the ceiling that are raised are the removable boards?

A. Yes.

Q. Which cover the suctions?

A. Yes.

Q. Or the bilges, when the vessel has bilges?

A. It is customary to clean the bilges in a double bottom ship.

Q. Is that all?

A. Clean the bilges and suctions.

Q. Aside from that the cement in other parts of the vessel goes without observation at all?

Mr. Carter: Objected to on the same grounds previously stated.

A. That is a part we do not have to look after; that is done in the shipyard; the ceiling is fastened down except places where we take up to clean our suctions.

Q. That is your experience, is it?

A. Yes, sir, that is my experience.

Q. You were on the vessel after she discharged in Phila-
226 delphia and came on to New York?

A. Yes, sir.

Q. And when she got here the patch was taken off, was it not; the temporary plate which closed this hole was removed in the presence of the surveyors?

A. I think so; I was not there when it was taken off.

Q. Did you ever make an examination of the edges of this hole?

A. I was down there and looked at it while she was in the dry dock, but I didn't take particular notice of the edges of the hole; I saw where it was pressed in, where the edges were pressed in.

Q. You mean turned in?

A. No, I couldn't say turned in; it looked like a puncture from the outside, that is my observation.

Q. Weren't the edges of the hole itself turned in a little?

A. They were dented in some as far as I could see; turned in a little.

Q. Did you put your hand in that hole?

A. No, I just looked at it from the outside, observation from the outside standing right under it.

Q. You have never, at any time, either down in San Juan or New York afterward, ascertained what the thickness of the plate was at the hole?

A. No, I couldn't tell you.

By Mr. McGrann:

Q. How did you get out when you finished loading, from the dock,

with your own steam?

A. Yes.

Q. You had your own steam all the time you were lying at the dock, your own engines?

A. Yes, we had steam on the engines; we have to keep steam for our winches.

Q. Then, when you finished loading you simply——

A. We hove off with the anchor; we had an anchor for heaving the bow off, and hove off with the anchor.

227 Q. When did you drop the anchor, when you first went in?

A. In mooring the ship at Quartermaster's Dock we let go the anchor, and paid out on the chain and hove her bow in, hove her right inside.

Q. Broadside on?

A. Broadside on.

Q. When you finished loading you simply hauled up to the anchor again?

A. Yes.

Q. And then got out with your own engines?

A. Yes.

Q. Turned over your engines?

A. Yes.

Redirect examination by Mr. Carter:

Q. You have testified to counsel's question for the Insular Line in regard to the 25th of April, 26th and 27th and the other dates from your log which shows at 6 A. M. a certain number of inches in the different holds; those different inches as shown on the log—when that was measured by the carpenter what did you do with that water, let it remain in or pump it out?

A. Pumped it right out.

Q. And as soon as it is pumped out the vessel was considered as dry, and dry entered in the log?

A. Yes.

Q. While loading at San Juan did the stevedores work that night of the 25th?

A. Yes, they worked at night.

Q. All night?

A. Up to the time we sailed, yes, sir.

Q. But during the night they were working the whole of the hatches of the ship loading her with a cargo of sugar?

A. Yes.

Q. I understood you to say in answer to counsel's question for the Insular Line that, at Quartermaster's Dock, you had never been there with the Julia Luckenbach loading under the same draft that you did on this occasion on the 25th of April?

228 Mr. McGrann: I object to the part of the question that refers to the draft; I don't understand the witness has said anything about the draft previous to this occasion.

A. We didn't usually load down to that draft when I used to run ut first officer on the Julia.

Q. Since you were master of the Julia before this voyage out to San Juan you had never been there with the ship before at Quartermaster's Dock; you had never been there with the Julia to Quartermaster's Dock, had you?

A. When I used to go chief officer I said we used to go to Quartermaster's Dock but we didn't load so deep; we only took in a small quantity of cargo.

Q. This blueprint showing Quartermaster's Dock and certain measurements off the dock, you will notice that if that is Quartermaster's Dock marked A and B upon that blueprint—can you state whether or not those measurements are correct, given by the scale on that chart; you couldn't tell that, could you?

A. No.

Q. About 10.15 o'clock on the evening of the 25th of April, how did you ascertain the steamer was ashore or aground?

A. It was so long ago I don't remember just how it was, how I knew.

Q. Is there any doubt in your mind that the ship was on the ground?

A. There is no doubt but what she was aground; I know the ship was aground.

Q. You have been asked in regard to this cement being in the ship; is that cement put there for the purpose of protection of the sugar, drainage, or is it put there simply for the purpose of protecting the iron from rust?

A. To protect the ship's bottom, the bottom of the ship from rust.

Q. In loading sugar from your experience as a master
229 mariner does it require to have cement in the ship, or cannot dunnage be used for the stowage of sugar?

A. Dunnage is to be used; always use dunnage, dunnage a cargo of sugar.

Q. They used it when you loaded it on this occasion?

A. Yes, sir, the cargo of sugar was dunnaged.

Q. So that from your experience the cement that goes into the ship is not put there for the purpose of protection of the stowage of sugar?

A. No, sir, the ceiling is never cemented.

Q. The cement is against the inside of the plates?

A. Yes.

Q. And in front of that cement is your ceiling?

A. Yes.

Q. Your cargo of cement loads upon that ceiling?

A. Yes.

Q. But you first put dunnage?

A. Yes.

Q. So that in the end the cement does not play any part in regard to the protection of the sugar itself, is that right?

A. Yes.

Recross-examination by Mr. McGrann:

Q. Speaking of the cement when you repaired the damage, didn't you fill the bottom with cement; you replaced the cement, didn't you?

A. No, sir—oh, yes.

Q. I mean, when you came back to New York?

A. I filled it right full; filled it from one frame to the other right full of cement, right over that patch.

By Mr. Kneeland:

Q. All over the ship?

A. No, all over where we repaired it out there temporarily.

By Mr. McGrann:

Q. I don't mean San Juan, I mean when you made the re-
230 pairs in New York?

A. I couldn't tell about the repairs in New York.

Q. You didn't have occasion to see what they did?

A. No.

By Mr. Kneeland:

Q. Let me understand about this; you say after you put the plate on with the gaskets and screwed it up, then you filled that space with fresh cement?

A. Yes, the survey called for it.

Q. So, when she got up here again there was cement to break out?

A. They had to break that out.

Q. To get at it?

A. Yes; that was called for in the survey.

Q. What would happen in the case of an iron ship carrying sugar if she didn't have the bottom cemented?

Mr. Carter: Objected to as incompetent, not pleaded, not within the issues, not raised by either the libel or answer.

A. She would go all right; she can carry sugar all right.

Q. For how long?

A. I couldn't tell.

Q. You don't think the sugar drainage has a detrimental effect upon the iron in a ship's bottom?

Mr. Carter: Objected to on the same ground as previously stated.

A. Dry sugar wouldn't have any effect.

Q. Dry sugar wouldn't?

A. No, sir.

Q. Sugar drainage is never dry, is it?
A. No.
Q. How about wet sugar or sugar drainage?
A. Well, I don't know; she would carry sugar a long time.

231 NEW YORK, April 28, 1913.

Further depositions taken on behalf of the Luckenbach, at the office of Messrs. Burlingham, Montgomery & Beecher, No. 27 William Street, New York City, with the same appearance and under the same stipulation as heretofore noted.

THOMAS HALEY, being duly sworn and examined as a witness for the Luckenbach, testifies as follows:

By Mr. Carter:

Q. Were you the chief officer of the Julia Luckenbach on the 13th of April, 1912, when she started on her voyage from New York to Porto Rico?
A. Yes, sir.
Q. What ports, if you remember, were you bound to from New York?
A. Went to Ponce, and from Ponce to Aguadilla, and from there to San Juan, and from San Juan to Arecibo, and finished loading.
Q. From the time of leaving New York, April 13, 1912, how long had you been on the Julia Luckenbach?
A. I was on her about a year and a half that time, and I was on her two and one-half years once before; I was out of her seven months, when I went back.
Q. (Handing witness book) I show you this log and ask you whether or not that log is in your handwriting?
A. Yes.
Q. Known as Claimant's Exhibit A for Identification?
A. Yes.
Q. Is that the log covering the voyage from New York to Porto Rico and to Philadelphia?
A. Yes, sir.

232 Q. Is that log in your handwriting?
A. Yes.
Q. Have you been over the log?
A. Yes.
Q. Is your signature attached to the log?
A. Yes.
Q. Does it accurately detail the incidents of the voyage?
A. Yes, gives all the details of the voyage.

Mr. Carter: I offer the log in evidence which was marked for identification Claimant's Exhibit A.
It is marked Exhibit A in Evidence.

Q. In your examination in regard to this voyage from the time of leaving New York up to the time of your arrival in Philadelphia

you are entitled to refresh your recollection from this log, if I ask you anything you do not recall; do you understand?

A. Yes.

Q. When the steamer left New York on the voyage to ports in Porto Rico on April 13, 1912, what was the condition of your steamship?

A. First-class condition.

Q. Aboard your steamer have you a certain practice or mode of procedure that you adopt during a voyage to ascertain whether or not the ship is in good condition during the voyage?

A. Yes.

Q. What is that practice or mode of procedure that you adopt to ascertain her condition?

A. We see that everything is fit to go to sea and see that the wells are all clear and that the limbers are all clear and that the pumps are in working order.

Q. In reference to taking any soundings of the ship during the voyage, who does that?

A. The carpenter sounds the ship.

Q. When?

A. In the morning, noon and evening.

Q. When the soundings are taken by the carpenter, who
233 does he report them to?

A. The chief officer.

Q. During the voyage out from New York to the first port in Porto Rico, Ponce, what was the condition of your vessel as to the reports from the carpenter?

A. Seaworthy.

Q. And the condition as found each day is marked in the log-book, isn't it?

A. Yes, sir.

Q. What word do you use to indicate her condition; what word did you use?

A. Soundings.

Q. What word do you use to indicate her condition in the log as to the soundings?

A. She was in seaworthy condition.

Q. I call your attention to the word "dry"?

A. That means there was no water at the soundings, she was perfectly dry; that is, there was no water to be got out of the ship; she didn't show any water on the soundings.

Q. I call your attention to the entries showing the inches in the different holds of the vessel, as marked on your log; what does that indicate?

A. It indicates the number of inches in the hold at the time the soundings were taken.

Q. What was done with that afterwards?

A. The pumps were put on and it was pumped out.

Q. That is done each and every day?

A. Yes, every time the soundings are given, if it shows any water it is pumped out.

Q. From the time she left New York until she arrived at Ponce, what was her condition?

A. She was tight.

Q. After you left Ponce and went to Aguadilla, what was her condition then?

A. She was tight.

Q. Were those soundings made on leaving Ponce to go to Aguadilla in regard to finding out the condition on the voyage?

A. We were going to load cargo; we clean the holds and limbers and strainers, and have them ready for loading sugar when we arrive at San Juan.

234 Q. On your arrival at Aguadilla you discharged the balance of your cargo?

A. Yes.

Q. Then you went to San Juan to load?

A. Yes.

Q. On your arrival at San Juan how did you receive your orders to load there?

A. We got orders to go into the Quartermaster's Dock to load sugar.

Q. From the time you arrived at Quartermaster's Dock up to the time of finishing the cargo there, what was her condition?

A. Good condition.

Q. Before starting to load the sugar at San Juan what did you do with respect to finding out what the condition of her pumps and her rose boxes and strainers was?

A. We overhauled them always before loading; we go through the holds and overhaul them, take the limbers up and see if the limber holes are all clear and strainers were all clear, and the engineer pressed the water through from the sea into the hold to see if the pipes were in good order, which was done.

Q. Was that done at the time just before you started to load your cargo at San Juan?

A. That was done as soon as the cargo was all out of the ship, that is, the outward cargo.

Q. Were you present at the time that was being done?

A. Yes.

Q. Is that part of your duty to see that it is done?

A. Yes.

Q. I call your attention to the report in your log under date of April 25, 1912, and ask you to please read what that entry is in regard to the vessel ashore or aground?

Mr. Kneeland: I object to the witness reading from the log; ask what he knows about it.

Mr. McGrann: Same objection; I think the witness should testify from his own knowledge.

235 Q. Do you know, without looking at your log, whether the ship was aground on April 25, 1912?

A. Yes, she was aground, aground at Quartermaster's Dock; we hauled her off there; hauled the bow off from the mud so we could

finish loading; she was aground between 10 and 11 o'clock. I know that.

Q. Did you make any entry of it in your log?

A. Yes.

Q. I call your attention to the entries in the log under date of the 25th, and please state whether or not there is an entry there in regard to the ship being aground?

A. Yes, it says 10.15 here; I knew it was about 10 o'clock.

Q. You said something about hauling off the bow from the dock, so she wouldn't ground; who gave you instructions down at San Juan to do that?

A. The superintending stevedore of the Insular Line.

Q. What is his name?

A. Conners.

Q. What did he say to you?

A. He told me to have her bow hauled off, that if she laid where she was laying without the bow being hauled off he was afraid we wouldn't be able to get her off when she was finished loading, and we better haul her off forward so that there would be a lead on the chain to heave her out over the bank.

Q. Were those instructions given to you by the superintendent of the Insular Line on the same day, on the 25th, that the entry appears in the log that you were aground?

A. Yes.

Q. I also call your attention to the entry in the log down below there in regard to the condition, what is the word there?

A. "Dry."

Q. From the time you left San Juan until you arrived at Arecibo, what was the condition of the steamer?

A. She was tight.

Q. Were the tests made the same as previously?

236 A. She was always attended to, the soundings were taken regularly; no water.

Q. During that time was there anything discovered when the ship was leaving San Juan up to the time of your arrival at Arecibo?

A. No.

Q. At Arecibo did you lie at the dock or out in the roadstead?

A. Laid in the roadstead.

Q. Did you have sufficient water underneath the ship then?

A. Yes.

Q. How much was under the ship at Arecibo?

A. Nine or ten fathoms.

Q. After finishing loading your cargo at Arecibo and before starting to go to her destination, which I believe was Philadelphia, was it not?

A. Yes.

Q. Look at the log and tell me what the draft of your vessel was forward and what the draft of your vessel was aft?

A. Forward twenty-four feet ten; aft twenty-five feet nine.

Q. When you finished loading at San Juan can you recall what your draft was then, when you finished loading?

A. When she was—when I got the last draft she was drawing about twenty-three feet four, and she was hard in the mud then, and twenty-three forward.

Q. What was her draft when she was aground in the evening of the 25th of April?

A. The first of the evening there she was drawing twenty-three aft and twenty-two feet eight forward; that was along about 7 o'clock in the evening; about 8 o'clock in the evening.

Q. Had you ever been in the Julia Luckenbach before, loaded at Quartermaster's Dock?

A. Yes.

Q. With sugar?

A. Yes.

Q. During the time previous to this and the time when loading, have you loaded as deep as you had on this occasion?

A. No, sir.

Q. Have you been to San Juan since the Julia Luckenbach loaded that cargo of sugar?

A. Yes.

237 Q. What vessel?

A. The San Mateo.

Q. What was the last time you were there?

A. I was there about two weeks ago; I just came from there.

Q. Before the two weeks in the San Mateo, had you been there in any other vessel?

A. The Julia and the San Mateo was the only two I was there with.

Q. In the San Mateo, it is two weeks ago since you were there at San Juan?

A. Yes.

Q. While you were there did you notice whether or not there was any improvement being made at Quartermaster's Dock, in regard to the dock being repaired or dredging being done?

Mr. McGrann: Objected to as incompetent, immaterial and irrelevant.

A. They had been rebuilding the dock there and they told me they had been dredging there; I got twenty-four feet of water there this time.

Q. This time when you were at San Juan did you take a sounding at Quartermaster's Dock?

A. Yes, I always take them at every dock.

Q. What did you find?

A. Twenty-four feet.

Q. How close would that be to the dock?

A. Right alongside the dock, that was at the keel, in the center of the ship.

Q. In lying at San Juan loading on this occasion in the Julia Luckenbach, you are now testifying about, what do you say was the depth of water there?

A. Twenty-three feet.

Q. Would that be the same depth on the 25th of April, when the ship was aground, twenty-three feet?

A. Twenty-three feet was the highest water they got; the ebb and flow was two and one-half feet there.

Q. What would you say as to the evening of the 25th of
238 April, when she was aground, as you stated in your log, would that indicate the tide was low?

A. Low tide, yes, sir.

Q. After you were loaded at Arecibo, you started on your voyage to Philadelphia?

A. Yes, sir.

Q. Look at your log and tell me what time you started from Arecibo, bound on your voyage?

A. 8.12 P. M. the 27th of April.

Q. After you started out on your voyage what kind of weather did you encounter?

A. The weather was fair when we first left; that was on Saturday, I think; Sunday it was blowing strong from the northeast, quite a heavy sea, only the decks were flooded all around; flooded up that night, in the evening.

Q. Does your log accurately describe the condition of the weather your ship passed through from the time you left Arecibo up to the time you discovered the leak?

A. Yes, I think so; it should.

Q. Look at it and tell me whether it does or not?

A. Yes, sir, it describes the weather.

Q. But you couldn't testify as to the condition of the weather you met from the time you left Arecibo until you returned back to Porto Rico without looking at your log?

A. From the time we left Arceibo and returned to Porto Rico we had strong——

Q. Could you testify as to the conditions you passed through without looking at your log?

A. Yes, boisterous, we had strong winds, heavy sea.

Q. Your log accurately describes from the time you found the leak on the 28th of April at 7.35 as to what was done aboard the ship, does it not?

A. Yes.

Q. After the leak was discovered on the 28th of April, what was done on board the ship in regard to the pumps?

A. The pumps were put to work pumping at once.

239 Q. Was there any trouble with the pumps working?

A. No.

Q. During the time you were on board the ship, as you have testified to, have you ever found that the pumps were not sufficient, if they were required to keep the water from the ship?

A. Yes, sir, they were: we never had any trouble with the pumps all the time I was in the ship.

Q. And the same pumps were in the ship as on the loading of the cargo at San Juan?

A. Yes, sir.

Q. What about the rose boxes and strainers?

A. They were in perfect order.

Q. What would you say from your experience as a mariner, were they sufficient for that steamship, the rose boxes and strainers?

A. According to other ships I have been in they were the same capacity; we never had any difficulty; always kept the ship free.

Q. From the time you turned around to go back to San Juan on the 28th of April, how did the pumps act?

A. Well, they done very well until the night before we got in there they commenced to clog with sugar, and we had to refresh them with sea water to get the sugar out, and the pumps pumped all right after they had been refreshed and got the sugar out.

Q. Would it be the sugar that would clog the pumps?

A. Yes, the sugar.

Q. Was there anything the matter with the bags the sugar was in, did you notice?

A. I didn't see anything the matter with the bags; the bags were all melted, the sugar was all out of them; there wasn't anything to stop the strainers from coming through; the suction was there, but the sugar was where the trouble would be with the pumps, the sugar was coming through.

Q. On your arrival back at San Juan what was done about getting the water out of the vessel?

240 A. The pumps were kept going and they got a pump from the shore and worked onto her, and they used buckets bailing the water out.

Q. Why was the extra pump required to be employed from shore as well as taking the water out by buckets?

A. By that time the sugar had all got loose and the bagging had got down around the pumps.

Q. What do you say as to whether or not the pumps of the steamship would have been sufficient to have kept the water clear if the sugar and bagging had not got around the pumps and choked them?

A. I believe they would.

Q. There was no difficulty from the time the leak was discovered on the 28th up to the time you arrived near San Juan, and before the sugar commenced to melt and get near the pumps, for the pumps of the steamer to keep her clear of water?

A. No.

Q. And there was no trouble from the time you discovered the leak in regard to the pumps working on the steamship and getting the water through the pumps?

A. No, sir, there was no trouble at all.

Q. There was no trouble getting water through the pumps?

A. No, sir.

Q. While lying at San Juan did you do anything in regard to taking part with the diver in regard to ascertaining where this leak was?

A. I helped the diver get lines over the side and locate the leak, and after we found the leak he drove a plug of wood into it, made a

wooden plug and put it into it, and after he got it dried out so he could get where the hole was we went down and had a look at it.

Q. Did you go down?

A. Yes, I was down.

Q. What did you do when you went down there?

241 A. I looked at the hole and seen about how big it was, and found out there was a hole there as near as I could judge, a kind of an oval, something the shape of that (indicating), I suppose an inch and a half or inch and three-quarters one way and half an inch the other way.

Q. From your observation of that hole could you say how that puncture was caused, or hole was caused?

Mr. McGrann: Objected to as calling for a conclusion.

A. In my estimation from the inside, it was caused by getting in on some hard substance which had caused a hole, going up through the ship; it looked to me as if the hole was made from the outside.

Q. In what way did the inward part indicate that it might be made from the outside?

A. It looked like you take a piece of paper and shove your hand through it; it kind of pressed the edge up on the inside: it looked like something had shoved it up.

Q. The stopping of this leak was done after the cargo was taken out of the holds of the vessel?

A. Part of the cargo, yes, sir.

Q. And the leak was on what side of the ship?

A. Starboard side, just aft of No. 4 hatch.

Q. While discharging this cargo, were the ship's pumps kept going too?

A. Yes.

Q. After you got No. 3 and 4 hold clear of water and the leak stopped, what did you do with the cargo?

A. We cleaned the holds out; we lifted the limbers up and cleaned the holds out again, all the strainers, and shifted some of the cargo from forward aft, and restowed it over again, what was left of it.

Q. When you went down to see where this hole was on
242 the starboard side of the vessel, did you notice whether or not there was any covering on the inside of the skin of the ship?

A. Not any more than being cemented there.

Q. How did that cement look to you, in regard to its condition?

A. It looked to me like it had been knocked up by something from below, the cement was good around the outside of the hole.

Q. Do you mean it was good forward of the hole as well as aft of it and around it?

A. Yes; where it was cemented over the floors, it was knocked up; of course the cement was fairly good around the outside, too.

Q. From your observation of the hole as you saw it from the inside, can you state whether or not it seemed to be rusted, worn or corroded on the inside?

A. It wasn't rusted, the cement was there; you couldn't see any rust; the iron was there and was covered with cement up along on the timbers, on the floor timbers, that would be more or less rusted from water, and it would show a kind—it showed a kind of red color from the steam of the sugar; I didn't take notice of any rust.

Q. Could you tell from your examination of that cement as it appeared to you at that time what would cause that condition as to the breaking of it?

A. The only thing I saw could break it was something coming up through the bottom of the ship; she lay on something hard and it shoved up through the bottom; I was certain the hole was made from outside in; that looked very plain in my estimation.

Q. Can you account or give any reason why this hard substance which you say must have penetrated from the outside in, could remain in the ship from the time of leaving San Juan, going to Arecibo, and until started on your voyage and being out about a day or so before anything happened, what do you say about
243 that?

A. My expression on that would be that whatever it was was forced into the hole with such force that it never fell out again until such time as she got out in the seaway and pressed it out straining.

Mr. McGrann: Objected to as being entirely speculative and not based on any fact at all.

Q. Would you say that the hole you saw in the plate on the starboard side was in the ship from the time she left New York up to the time she arrived at her first port, Ponce, and going to Aguadilla and up to the time she arrived at San Juan?

A. No, sir, it certainly was not, it could not have been.

Q. How long have you been going to sea, up to April 12?

A. Thirty-five years.

Q. How long have you been on steamships?

A. Thirteen years.

Q. Do you hold a master mariner's certificate?

A. Yes.

Q. How long have you held that?

A. I got the English master's since 1892, and I have the American master's—this is the third issue; it will be out next year; it will be fifteen years next year.

Q. I suppose your voyages have been partly around the world?

A. They have been most all around the world.

Q. While you were on board the Julia Luckenbach had you experienced any trouble with the pumps or strainers or rose boxes?

A. No.

Q. Was there anything to indicate from the time you arrived at San Juan, and loading, and even to go to Arecibo and while lying at Arecibo loading, and up to the time you started to go on
244 your voyage, was there anything to indicate to you or show that the ship was leaking?

A. No.

Cross-examination by Mr. McGrann:

Q. Where is the entry you referred to as grounding at San Juan? (Witness indicates in log.)

Q. Is that your handwriting?

A. Yes, sir.

Q. That whole entry is in your handwriting?

A. Yes.

Q. When was this entry put in your log?

A. It was put in the same time it happened, that day within ten or twelve hours of the time; every evening I used to write it up; we keep a bridge log, and copy it from the bridge log every evening.

Q. Was this same entry in the bridge log?

A. Yes.

Q. That is this entry as to the steamer being fast aground?

A. Yes.

Q. You are quite sure that was in the bridge log?

A. Yes.

Q. Was it written in lead pencil there?

A. Yes.

Q. Who wrote that?

A. I wrote it.

Q. When did you write that?

A. I wrote that in the evening about 12 o'clock that night; I was out all night that night, and we keep notes every night at 12 o'clock and at 8 o'clock and at 6 o'clock and 4 o'clock at the end of the watch.

Mr. McGrann: I call for the production of the bridge log.

Mr. Carter: I haven't got it, it is destroyed.

Q. Do you remember when you did write this up actually?

A. Well, I wrote it the next day probably after, that was at night time and I wrote it the next evening.

245 Q. You are quite sure you didn't let it go until after you returned to San Juan?

A. Oh, no, sir; it was done out there; I always write the log up—most every evening I write my log up, I don't let it stand.

Q. I see in the logbook there do not seem to be any soundings entered except the word "dry" up to Saturday, April 20, when there is entered: "No. 1 hold 9 inches, and No. 2 hold 0, No. 3 hold 8 inches, No. 4 hold 8 inches"; how is it you commenced making water, which seems to be the case, at that time; can you explain that, Saturday, April 20?

A. I get those soundings from the carpenter and always put them down according to how I get them, mark them in a little book in my pocket and then mark them down.

Q. That is correct, is it?

A. Yes.

Q. That would indicate that no soundings were shown in any of those holds prior to April 20 on that voyage, is that true?

A. Yes, that is true if it is there.

Q. You examine the log yourself, do you?
A. Yes, sir.
Q. What was the date of leaving New York, April 13?
A. Yes, 5.20 we left.
Q. And there are no soundings shown anywhere for any day up to April 20?
A. Yes.
Q. When you had nine inches forward and eight inches aft?
A. Yes.
Q. And that was while you were bound to Ponce?
A. Yes.
Q. In other words, the soundings started showing before you got to Ponce, is that true?
A. Yes, sir, according to that it is true.
Q. They continued, then, according to that from that on, including the 22nd up to the time you discovered this water in the after hold?
A. If it is marked there it is true.
Q. I ask you to examine the logbook if you cannot state
246 from your own knowledge, and state whether that is true?
A. Yes, sir, it is true.
Q. Isn't thirteen inches a rather unusual sounding?
A. No, sir, not in our No. 3 it was not.
Q. I see under date of April 22, while you were at Aguadilla, that the soundings showed thirteen inches in No. 3 and 4?
A. Yes, that is correct.
Q. Isn't that an unusual sounding to get thirteen inches of water?
A. 3 and 4 run into one, there is only one sounding in 3 and 4.
Q. You have indicated in the log two?
A. No. 3 and 4, it is all one hold and it is one pipe sounds the two holds; there is no bulkhead in the lower hold.
Q. That simply indicates there were thirteen inches in the two holds?
A. Yes.
Q. Isn't that an unusual sounding?
A. Not for two holds it isn't.
Q. I see that there seems to be an erasure in the logbook under April 22, under the soundings for 3 and 4 holds; it seems to me that under the 3 and 13 it looks as if there might have been a 6, which was erased and the 3 written over it in both cases; does it appear so to you?
A. I notice a mark there of some kind.
Q. Do you remember anything of that sort, whether you had sixteen inches of water?
A. I don't ever remember having sixteen inches of water into her, never.
Q. Do you remember making any change there on April 22?
A. I might put down the wrong figures and recorrect them.
Q. You wouldn't be apt to do that in both places?
A. Yes, if I happen to get a wrong sounding and put them down,

I would recorrect them, but I wouldn't mark them out underneath; you aren't supposed to take anything out of your logbook or
247 scratch it out.

Q. Under April 22, while you were at Aguadilla, I see the entry "dry" below the soundings?

A. Yes, sir, that is the tanks.

Q. You said on your direct examination that indicated the bilges were dry, that they were pumped out?

A. I said there is no figures indicated——

Q. You will have to go back to find that?

(Witness indicates under April 18, where no figures are shown until the hold sounding "dry" appears.)

Q. The word "dry" appears also under the 22nd?

A. That means in the tanks.

Q. In the same way?

A. That is the tanks.

Q. Then that doesn't indicate the holds were dry, does it?

A. That indicates down there where it is underneath, that indicates the tanks are dry, but where the tanks and holds are dry it is all marked dry.

Q. When you got thirteen inches of water on the 22nd in 3 and 4 holds, did you pump out those holds?

A. The pumps were started, but she would suck at fourteen inches if there was any roll on the ship at all.

Q. Would you pump it out so you could call it dry, similar to the entry under the 16th, for instance?

A. Just as long as the pump won't take any more, if the pump sucks we call it dry.

Q. On the 23rd you got twelve inches again?

A. Yes.

Q. Would that mean that having pumped out thirteen inches on the 22nd that you would make twelve inches again on the 23rd?

A. It would be impossible for us to get the whole contents of the water out of there, because the pipes don't go within two inches of the bottom of the ship anyway in no ship; the suction is underneath that again, and the rose boxes; at any time even if the boat
248 was on the dry dock there would be two or three inches of water there.

Q. I see under the entry for the 25th, for instance, in No. 2 that you have a sounding of 3?

A. Yes.

Q. You would get it as low as three inches anyway?

A. You can when the ship is either by the head or by the stern and carries all the water into the suction: if the ship is on an even bottom you couldn't get it.

Q. Couldn't you get this water out to three inches on the 22nd in 3 and 4 hold?

A. No, you couldn't, because it didn't run to the rose boxes.

Q. Why couldn't you get it out?

A. The trim of the ship wouldn't allow us to touch the rose boxes.

Q. Haven't you given us the trim on the 25th as being greater at the stern than at the head?

A. Yes, that is all right, but this here thirteen inches in No. 3 hold is about ninety feet from the stern of the ship; the ship is 313 feet long, I think, and that would be about one-third of the ship, or probably a little more from the stern where that sounding is, so there would really be water aft when there wouldn't be any at the rose boxes.

Q. How do you account for the fact that on the 19th there was no water in No. 3 and 4?

A. It must be—was she bound to Ponce then?

Q. She was bound to Ponce, Porto Rico, whereas under the 20th when she was still bound to Ponce and where presumably there would be no change in the draft, you show eight inches?

A. It depends on the roll of the ship and upon the pitch of the ship whether they get the pumps thoroughly dry; if the ship has got a list you can't get the water.

Q. As a matter of fact at any rate water started showing in 3 and 4 holds on April 20, before you ever reached San Juan,
249 Porto Rico?

A. Yes, if those soundings are correct.

Q. You are quite sure the soundings are correct?

A. Yes, I would swear to them soundings.

Q. You have said there couldn't have been a hole in the bottom while you were en route to Ponce or to Aguadilla or to San Juan; if your theory is correct that something remained in this hole that you afterward discovered, couldn't it just as readily have remained in the hole on those voyages as from San Juan to Arecibo?

A. I can't answer that question because I am only supposing it stayed in the hole; the hole might not have been made there, for all I know; I am only judging it; I am only saying such a thing could happen that something would get in there.

Q. I am asking if the same thing could not happen before San Juan as well as afterward?

A. It certainly could, but you would think the ship would leak some from the bad weather she had before that.

Q. Haven't you shown by your log that the ship did leak some in No. 3 and 4?

A. Very little, but when we came to get the pumps all going it was a very different story then; every ship leaks a little, more or less.

Q. What first attracted your attention to the fact that the ship was aground at Quartermaster's Dock at San Juan?

A. Because I was watching the draft of the ship and I knew there wasn't water enough there to load her down to the number of bags she was going to take into her there.

Q. How did you know that?

A. I had been there before and have sounded in the Julia, and we never loaded the ship over twenty-two feet six or twenty-two feet seven.

Q. You had loaded it to twenty-two feet six and twenty-two feet

seven at that same dock previously?

250 A. Yes, my soundings found twenty-three feet of water.

Q. I mean before this occasion you had loaded the Julia twenty-two feet six or twenty-two feet seven?

A. Yes.

Q. You loaded her twenty-two feet nine or twenty-two feet ten?

A. By putting her in the mud, yes, sir.

Q. If there were twenty-three feet of water there couldn't you load her down to twenty-two feet eleven?

A. I have never loaded her deeper than that, but I knew there was twenty-three feet of water and I knew the ship was taking more sugar than she ever took before.

Q. You knew that before she took the ground?

A. I didn't know how much she was going to take at the time I went to the dock; I knew we were going to load sugar and the stevedore told me he was going to load a certain number of bags; I don't recollect the number of bags.

Q. He told you that before you took the ground?

A. He told me that after she was aground; she was aground at low water in the forenoon; it was low water at 10 or 11 o'clock that day.

Q. What time did you go alongside the dock?

A. I think in the morning we went alongside.

Q. At what hour?

A. I don't know exactly the hour; it is in my log.

Q. Refresh your memory from the log?

A. We went to the dock April 23 at 6.25; she was fast to Quartermaster's Dock.

Q. A. M. or P. M.?

A. P. M.

Q. When did you start taking on the cargo from Quartermaster's Dock?

A. 7.30 P. M. the 23rd.

Q. Did you continue loading cargo from that on night and day up to the time you took the ground?

251 Mr. Carter: Objected to as incompetent, contradicting the terms of the charter party, which gives the possession and control of the loading and discharging of the steamship to the charterers, and also on the further ground that the charterers designated that berth for the ship to load at.

A. April 23rd we stopped work at 11 P. M. for the night, and on April 24th we renewed work at 6 A. M.

Q. Did they load from that on continuously?

A. It don't say in this whether they stopped that night or not; it says "6 A. M. renewed work"; that would be the 25th, but it don't say anything about stopping that night.

Q. Do you know whether they stopped work on the night of the 24th?

A. I couldn't say.

Q. When did you first know that the ship was aground; you

said a while ago she took the ground in the forenoon?

A. She did take the ground in the forenoon on low water, and that night again between 10 and 11 it was very low water again, and she would be aground drawing twenty-three feet six.

Q. What time was it in the forenoon?

A. About 10 o'clock.

Q. How long did she remain fast, then?

A. I don't know, but a couple of hours, I should judge, before the tide rose again.

Q. Was anything done to breast the ship out from the wharf?

A. She was breasted out that afternoon.

Q. That afternoon following the forenoon which she took the ground?

A. She was breasted off at 2 o'clock in the afternoon of the 25th.

Q. And that would be after she had taken the ground in the forenoon?

A. Yes.

Q. Then did you continue loading all that day?

252 A. Yes, we were working from 6 o'clock in the morning; we were working at 6 o'clock in the morning and we worked up all that night until 1.15 on the 26th A. M.

Q. Did you then complete the loading at San Juan?

A. Yes.

Q. At 1.15 A. M. the 26th?

A. Yes.

Q. Did you report to the captain that the steamer was aground in the forenoon of the 25th?

A. No, I don't know as I said anything about her being aground.

Q. Do you know whether he knew it?

A. I did in the evening after we hove her off that night, I did, I told him about it.

Q. What time did you tell him?

A. I told him along about 11 or 12 o'clock that night, along about midnight.

Q. Were you still aground when you told him, was the ship still aground?

A. Yes.

Q. You were loading at the same time?

A. Yes.

Q. And you continued loading all the time she was aground?

A. Yes.

Q. Did you do anything in the way of hauling her out further?

A. No, we swung her bow off so the chain would get a lead to the anchor; the mud is soft there—so we could heave her through the mud.

Q. It isn't a coral bottom there, it is all soft mud?

A. It is supposed to be soft mud; I haven't found any there.

Q. Haven't you taken soundings there?

A. Yes, soft mud according to soundings.

Q. Have you ever found anything except soft mud bottom?

A. No.

Q. How is that you remember these drafts that you have there of the ship, they aren't entered in the log?

A. In going alongside docks we try to load the ship more to trim—keep her six inches by the stern when we are taking
253 cargo in, so we will have her in trim in case we cut out part of the cargo at the latter part of it, and generally go from six to eight inches by the stern and follow the draft along; we don't let them go by the head, so we can have her in trim to go to sea.

Q. You have given drafts in feet and inches forward and aft?

A. Yes.

Q. Is it possible that you have retained in your memory for this year what those drafts were?

A. Yes, I can tell you the drafts of that ship carrying cargo for the last three or four years.

Q. For every port and every voyage?

A. Most every port, yes, sir; I do nothing else only tend to it; I have them pretty well down in my head.

Q. You say in the evening at 8 she was drawing twenty-three feet and twenty-two feet eight inches?

A. Yes, I recollect that.

Q. Where was the twenty-three feet, aft?

A. Aft.

Q. Was she resting on the bottom at 8?

A. She was touching the mud at 8 o'clock.

Q. How was it you say she was touching the bottom at 10 15?

A. I said she was hard aground at 10.15.

Q. You think she was touching the mud at 8?

A. Yes, she was drawing twenty-three feet of water and there was only twenty-three feet of water.

Q. Did you have any notice at the time that she was touching the ground?

A. I had the soundings of how much water it was there.

Q. You had soundings at the same time you took the draft?

A. Not at all times, but when it was high water—we had twenty-three feet of water, according to my soundings that I have taken at that dock for three years, and I knew at 10 o'clock the tide had fallen about two and one-half feet and the ship was drawing
254 twenty-three feet of water; she was drawing twenty-two feet eight forward, which would give her three or four inches drag.

Q. You have no memorandum in existence of the draft that you took on that occasion; did you write down what it was?

A. No, I have it in my memory, that is all.

Q. Do you mean to tell me that you can remember that in feet and inches, and also the other drafts?

A. I do under the circumstances of these docks; we are very particular when we go to those docks about the soundings and about the draft of the ship.

Q. What was her draft when she first went alongside the 23rd?

A. She was light; I didn't take her draft when she went alongside.

Q. When did you take the draft?

A. We took the draft at the time she was—it was night time, we were leaving.

Q. Previous to the 23rd?

A. I didn't get her draft when she was loaded, because we hauled her out over the mud bank that night.

Q. Did you get her draft at all while she was light after she was discharged?

A. Not after I got twenty-three feet and twenty-two feet eight.

Q. That isn't the question; I want to know what her draft was before you went alongside the wharf at San Juan?

A. I don't know what her draft was.

Q. Is there any part of your voyage at all that you can give me as you have given me this one?

A. Yes, according to the logbook I can.

Q. Refresh your memory from the logbook if you wish.

Mr. Carter: The question is objected to as immaterial as to the draft of the ship prior to her going to San Juan to load the cargo.

A. Here is one leaving Pier 27 Brooklyn, New York.

255 Q. Was that when she left on her voyage this time?

A. No.

Q. What date is that?

A. February 13.

Q. I wish to know on this voyage from New York down to Ponce, Aguadilla and San Juan; do you find any entry in the log from April 13?

A. I have the draft leaving Arecibo.

Q. What date?

A. April 27.

Q. Is there any draft entered there for the voyage excepting April 27?

A. No, sir.

Q. What is her draft light, can you tell me that from memory?

A. I really know fourteen feet six aft, and I think nine feet ten forward; I am not sure forward, but I am sure aft.

Q. Would that be her draft when she entered San Juan?

A. No; she had 300 tons of coal and she takes twenty-seven tons to the inch; when she went to the dock she would draw fifteen feet two or three inches; according to the coal.

Q. Fifteen feet two or three mean?

A. Yes—not mean, aft.

Q. Maximum draft?

A. Yes.

Q. Do you know how much cargo she took in at San Juan?

A. No, I don't remember; I think 33,000 bags, I am not sure.

Q. You say that the rise and fall of the tide is about two and one-half feet at San Juan?

A. Yes.

Q. If I am not mistaken the tide tables say one and one-half feet?

A. That is what it measured on the dock, two and one-half feet.

Q. Was it spring or neap tide at that time, April 25th?

A. I don't know; it all depends on the moon.

Q. Do you remember whether it was spring or neap tide?

A. If you are going to load at a dock——

Q. That is not the question; I want to know whether you can state whether it was spring or neap tide on April 25th at San Juan?

A. I don't know.

Q. You think it was a rise and fall of two and one-half feet?

A. Yes.

256 Q. That is the difference between low water and high water?

A. Yes.

Q. Can you state from your observation how thick the metal was around this hole that you say was punctured in the bottom?

A. I didn't measure it; it was pretty thin—where the edges came up it looked fair.

Q. Didn't it come up to a knife edge where it was punctured, those flaring edges?

A. Not exactly; it looked as if it was kind of scaled off.

Q. How was the plate in the vicinity of that, say within a foot or two of the hole, that was flat?

A. Yes.

Q. There wasn't any opening or buckling of the plates?

A. No, sir, not that I noticed; all I noticed was the hole and the shape of the hole, and when we came to nail it up and patch that hole the plate was in good order, when they patched it.

Q. When did you leave the Julia?

A. I left the Julia about seven and a half months ago.

Q. Do you know when this ballast of iron slag that they had aft was put into the Julia?

A. Yes, I was there when it was put in.

Q. Was it on your first service on the Luckenbach, or second service?

A. They had it in on two occasions; the last time they put it in I don't recollect the date, but the time it was put in—it had been in over a year, I know, or about a year.

Q. About a year before April 25th?

A. About a year before the accident happened.

Q. When you got at this hole didn't you have to break it and get under the ballast?

A. Yes.

Q. That flooring had not been disturbed from the time the ballast had been put in, had it?

A. No.

Cross-examination by Mr. Kneeland:

Q. The after compartment I understand is in one?

A. Both holds are in one, yes, sir.

257 Q. With two hatches?

A. With two hatches.

Q. Do you know what the length of the compartment is?

A. No, sir.

Q. Over ninety feet?
A. More than that, yes, sir.
Q. Do you know—that is, it reaches from the bulkhead, the cofferdam aft of the engine room clear back to the afterpeak bulkhead?
A. Yes, sir.
Q. Do you know how far it is from the afterpeak bulkhead to the after-coaming of No. 4 hatch?
A. No, sir.
Q. About?
A. I don't know; I judge it would be forty feet.
Q. How far forward did this ballast extend?
A. Well, the ballast extended to the after part of No. 4 hatch.
Q. And this hole was aft of the after-coaming?
A. About two feet out, but clear away; about two feet of the ballast to get to where the hole was.
Q. When you went down after you got the vessel pumped out and the cargo out, you first had to remove the ballast and then break up the ceiling?
A. Yes, sir.
Q. Then you got down in the compartment, between the compartments in which this hole was?
A. Yes, sir.
Q. Was there any cement in that compartment?
A. Yes, it had been cemented.
Q. Was there any then there?
A. Yes, there was cement there then.
Q. Hadn't that cement been broken up, washed out?
A. It had been broken where the hole was; that was all.
Q. Do I understand the cement was right around up to the edge of the hole?
A. It was broken away from the hole. I suppose a space about like that (indicating).

Q. How big a space was that between the frames in which
258 this hole was?

A. The compartments are supposed to be about two feet apart.
Q. And was there another longitudinal division which made a sort of a little pocket or box in which this hole was?
A. There was the intercostal keelson, which runs fore and aft, which was over the top of the hole.
Q. Was there any other fore and aft piece which would be near the keel?
A. There was another intercostal close to the keel.
Q. How close were those two intercostals together?
A. I suppose probably four or five feet apart.
Q. So that this hole lay in the compartment about two feet one way and four or five the other?
A. The timbers of the ship runs from the keel clean up to the side; down in the bottom of the ship she has the intercostals running fore and aft; the intercostal keelson runs fore and aft in the ship, and it was underneath one of those this hole was.

Q. What was the space between that one and the next one of the intercostals?

A. I should judge four or five feet.

Q. That is what I say; this hole lay between two frames?

A. Yes.

Q. Which were two feet apart?

A. Yes, sir.

Q. And between intercostals which were about four feet apart?

A. About that, I should say.

Q. Was the ceiling broken up, taken up over all that space, two feet by four?

A. The ceiling was—we took the ceiling up to locate the hole.

Q. Was it taken up over all that space between the two frames and between the intercostals?

A. I didn't take notice of that, but we took up in width, we took up about five feet of it in width up.

Q. Fore and Aft?

A. Athwartships; we took fore and aft probably eight feet; just cut a hole where we judged the hole was and took it up.

259 Q. How near to the hole itself did you find any cement?

A. The cement was very close up to the hole.

Q. How close?

Q. Quarter of an inch or half an inch, something like that.

Q. The captain had testified that that cement had all broken up and been washed out, that there wasn't any cement around there?

A. I don't know what he has testified; I am telling you what I have seen; I saw the cement there.

Q. You saw the cement there?

A. Yes, sir.

Q. The cement had not broken away from the skin of the ship all around?

A. Not all around; it was only apparent where the hole was.

Q. You said something about there being some portion of the after compartment that with the ship by the stern would not be drained out.

A. You see the sounding pipe is just between the two holds, 3 and 4 holds; it is down between 3 and 4 hatch.

Q. That is the sounding pipe?

A. That is the sounding pipe.

Q. Where are the suctions?

A. Two bilge suctions.

Q. Where are they?

A. One right up against the engine room bulkhead and the other was aft, the after end of the ship close to the tunnel.

Q. I mean, was it forward or aft of the sounding pipe?

A. One would be forward and one aft.

Q. One which is by the engine room bulkhead is way forward of the sounding pipe?

A. That would be way out altogether; this one near the bilge is right abreast the tunnel in No. 4 hatch: the water could be aft and it would not touch this.

Q. You have told me where the sounding pipe is which is right about the middle of No. 3 and 4 compartment?

A. Yes, sir.

Q. Are the suctions forward or aft of the sounding pipe;
260 I don't mean the one you are speaking about, but there are suctions aft, aren't there; you were speaking about the one next to the engine room bulkhead?

A. There is one out in the bilge abreast the tunnel; that is the one in the bilge; it would be about four or five feet aft of the sounding pipe, but it would be in the bilge.

Q. It would be out?

A. Yes, that would be the bilge pump.

Q. There is one on each side?

A. There is one on each side; there are four suctions in the ship.

Q. Would that suction be forward of No. 4 hatch?

A. Just forward of No. 4 hatch, in the wing.

Q. That is forward of the forward coaming of No. 4 hatch?

A. Yes, sir, in the bilge.

Q. Do you know where the pipes connected with those suctions run?

A. Yes.

Q. Where?

A. They run along into the engine room.

Q. And how do they reach the engine room?

A. They go through the floor timbers.

Q. Do they lead—they reach the pipe in the tunnel, in the shaft tunnel they reach the pipe that connects them with the engine room in the shaft tunnel?

A. The bilge suctions reach the pipe in the tunnel.

Q. How do they lead to the pipe in the tunnel from the position where the suctions are?

A. They lead aft into the run.

Q. They lead aft almost up to the after bulkhead?

A. Yes.

Q. And then turn?

A. Yes.

Q. And go amidships into the tunnel?

A. Yes, sir.

Q. And then come forward again?

A. Yes, sir.

Q. In other words, they run right back under the ballast?
261 A. They run back under the ballast cased in.

Q. You say the ballast had been moved once?

A. They had it in there once, and took it out altogether, and they renewed it by putting it back again.

Q. You were chief officer under Captain Pennington?

A. Yes.

Q. That ballast was put in before Captain Pennington joined the ship?

A. Yes, sir, that ballast was put in when Captain Conners was in the ship, I think.

Q. You are speaking now of the second time it was put in?
A. Yes, sir.
Q. Had you ever seen that ceiling raised in the after part of the ship?
A. Yes, sir.
Q. When?
A. I seen her ceiling taken off—had her floor up several times myself cleaning the bilges out on several occasions.
Q. Those are the little sort of hatches which are put over the place where the bilges are?
A. There is a floor right straight along; they had it up there; they renewed that floor some time ago; they had it all up and renewed it, whitewashed it.
Q. Do you mean under the ballast?
A. It was done while the ballast was out of the ship.
Q. Is that the time when the ballast was out—you mean you took it out for that purpose?
A. It was taken out for the purpose of the ship carrying more cargo for San Juan, the first ballast was taken out and it was out that time; it was out pretty near a year.
Q. How long ago was it that that ceiling was up, aft?
A. I couldn't say exactly; I didn't keep no dates on those things.
Q. It was when you were in her the first time?
A. No, sir, when I was in her the second time.
262 Q. The second time you were in Captain Pennington was master?
A. Conners was in the second time; Captain Dalton wasn't in her the second time; it was after Dalton left, those things were cleaned; because Dalton only made one trip in her when I was in her.
Q. During this time was she under charter to the Insular Line?
A. Yes, sir.
Q. You spoke about the appearance of this hole around the edges of the hole, as if something had come in there and punched this hole; wouldn't the driving in of a plug produce that appearance?
A. When he found the hole he said it was an oval hole; he wanted a plug to plug it; he said there was a hole like that (indicating), so he made a round plug the size of the hole and he shaped it the shape of the hole and took it down and put it in.
Q. That would turn those edges up if that was driven in from the outside?
A. It could have the effect of turning them some; of course I don't know how much.
Q. Were you aboard her after she finished her discharging at Philadelphia and came to New York and that plate was cut out?
A. Yes, sir.
Q. Did you see it then?
A. They didn't cut the plate out; they put a patch on.
Q. Did you examine the hole then?
A. No, sir; I was down looking at it, but I paid no particular attention to it.

Q. When you were aground this time in San Juan you were aground aft?

A. She was aground all over.

Q. How were you able to haul her bow off?

A. She wasn't aground when I hauled her out; I hauled her out before she grounded, at high water; I hauled her out at high water.

Q. I thought you said after she was fast aground at 10 or 11 o'clock you hauled her bow off?

A. No, sir, I said we hauled her bow off, but she was hard
263 aground between 10 and 11 that night.

Q. That was after you hauled the bow off?

A. Yes, sir, we hauled her bow off in the afternoon.

Q. Was that the time you spoke about as breasting her off at 2 o'clock?

A. In the afternoon, yes, sir.

Q. Did you only haul the bow off, or does breasting her out mean you pushed her away from the dock entirely?

A. We hauled the bow so we could get it on to an angle with the chain, so we could get a lead on the chain, as we had seventy-five or eighty fathoms of chain out, and we hauled her out so she lay on an angle running over the bank; if she loaded down inside the bank she would have the whole bank to shave away.

Q. That is what you mean when you speak of her being breasted off at 2 o'clock?

A. From the dock, yes, sir.

By Mr. McGrann:

Q. Was it at 1.15 they hauled her out entirely from the dock?

A. Yes, sir.

Q. That is the time you finished loading; I want to know now whether you hauled her out entirely away from the dock at that time; if not, when did you do that?

A. That was towards daylight, I think (referring to log), 1.40, at 2.05 A. M. we had the anchor up, April 26th.

Q. Does that mean the time you actually got clear of the wharf?

A. That is the time we got clear.

Q. Then you hauled out into the stream?

A. We went right to sea.

Q. You went right to sea after?

A. At 2.18 we went to sea; 2.40 A. M. we passed Morro Castle.

Q. She was then afloat?

A. After we dragged her over the bank, yes, sir.

264 Q. She floated at 11, didn't she?

A. She was hard aground at 11.

Q. I thought she was hard aground at 10.15?

A. I say between 10 and 11; the logbook says 10.15.

Q. When did she float after 11?

A. When she got water enough.

Q. What hour was that?

A. We started to heave her out at 1.40, according to the log.

Q. Was she afloat at 1.40?

A. She was on the bank; we hauled her over the bank; had her on the bank.

Q. Was she aground all the time from 10.15 up to the time you shoved off from that wharf and hauled up to your chain; was she aground all that time?

A. No, sir, she was aground—there was water enough to draw her over the flats, over the mud.

Q. I want to know what water that was between 11 and 2.05?

A. She was aground at 10.15 and we hauled her——

Q. You said you hauled her out at 2.05 A. M. the 26th?

A. 1.40 A. M. we took in the moorings, and at 2.05 we had the anchor; she would be afloat when the anchor was up.

Q. That was at what time?

A. 2.05.

Q. Can't you tell me whether or not she was afloat before that?

A. She was water borne, yes, sir; she was water borne before she got off to the anchor.

Q. When was she water borne?

A. 1.15 or 1.40.

Q. Which is it, 1.15 or 1.40?

A. 1.40.

Q. Isn't it possible she was water borne before 1.40?

A. No, sir, she was not; we had a hard time to heave her out over the bank; it took all the water there was there; we had a hard time heaving her out over the bank.

Q. You think she was water borne at 1.40 at the earliest?

A. Yes, sir.

265 Redirect examination by Mr. Carter:

Q. In reference to the entry of the steamship being aground on the 25th of April in the evening you stated that you had made an entry first in what they call the bridge log; what kind of a log was that bridge log?

A. It is a scrap log for that purpose.

Q. How was that entry made, in ink or lead pencil?

A. Pencil.

Q. After you made the entry in the bridge log and transfer the entry from the bridge log into the deck log, as they call it, what do you do with that bridge log then?

A. The bridge log remains in the pilothouse until the next day until it is filled out, and then the captain takes charge of it.

Q. When you left the ship did you leave it there?

A. Yes, sir.

Mr. McGrann: I call for the production of the bridge log.

Q. You spoke of the character of the bottom at Quartermaster's Dock as being mud, when breasting off and heaving off the bow; is the bottom alongside the dock the same as off from the dock in its character?

A. Mud, yes, sir.

Q. Is the mud alongside the dock purely mud, or is there anything else there?

A. I have not found anything else there; it is soft mud we find when we throw the lead down or let go the anchor; we find soft mud; whether there is rock underneath I don't know.

Q. Whether there is any iron or other material imbedded in the mud you don't know?

A. No, sir, I don't know.

Q. This lead when you put it down to get the depth or the character of the bottom, does it indicate whether there is iron there or rocks?

A. If it comes up with soft mud on it we call it soft mud.

266 Q. As to whether there is anything in that mud, any hard substance——

A. There could be stuff dropped over there; there is cargo dropped over there.

Mr. McGrann: Objected to as not responsive.

Q. When you put down the lead and find out what bottom is alongside Quartermaster's Dock, and it indicates mud there when you draw the lead up again, would that also indicate there was no hard material there or rocks?

A. No, sir, it would not do that, only it didn't happen to strike them if there was any there.

Q. Besides loading sugar at Quartermaster's Dock do you know whether there is any other kind of cargo discharged there?

A. Yes, they discharge all kinds of cargo there.

Q. What kind have you discharged at Quartermaster's Dock?

A. All kinds of general cargo.

Q. What kind would that be?

A. Flour, meal, iron.

Q. What kind of iron?

A. Bar iron; building material, such stuff as that.

Q. What vessels were there; what is the name of the steamers?

A. All the Insular Line boats that used to go there; they all discharged there; I ran for the Insular Line three years.

Q. On what vessel?

A. On the Julia.

Q. In discharging iron at Quartermaster's Dock do you know whether or not any fell overboard while discharging?

A. I know that to be a fact; we have lost it overboard ourselves there.

Mr. McGrann: I object to all this line of testimony as immaterial, irrelevant and incompetent.

267 Q. What kind of iron was it?

A. We have lost iron rails, railroad iron; we have lost iron bars; we have lost machinery, etc.

Q. Was that in the Julia or in other vessels?

A. In the Julia; that I know myself for I have seen that.

By Mr. McGrann:

Q. Are you in the employ of the Luckenbachs?

A. Yes, sir.

By Mr. Carter:

Q. The fact that you are, would that in any way affect the giving of your testimony?
A. No, sir, not a bit.

GEORGE A. LITTLE, being duly sworn and examined as a witness for the Luckenbach, testifies as follows:

By Mr. Carter:

Q. Were you the first assistant engineer of the Julia Luckenbach on her trip leaving New York April 13th, 1912, for Porto Rico?
A. Yes, sir.
Q. How long had you been on the Julia Luckenbach when she left on that voyage?
A. I had been on the Julia since the 9th of October, 1908, three years and six months.
Q. How long have you been an engineer?
A. On that vessel?
Q. How long have you held a certificate?
A. I have held a certificate since 1907; American license.
Q. How long have you had an English or foreign?
A. Since 1902.
268 Q. You were familiar, were you not, with the suction pipes and rose boxes and strainers on the Julia?
A. Yes, sir.
Q. On leaving New York on April 13th, what do you say as to their condition?
A. They were in first class condition when we left New York.
Q. In regard to the rose boxes or strainers what do you say as to whether or not there were sufficient aboard the steamer for her purposes?
A. Yes, sir, they were sufficient.
Q. Before loading the cargo of sugar at San Juan was anything done aboard the steamer in regard to examining the suction pipes and rose boxes and strainers?
A. Yes, the flooring was taken up around the strainers and the chief engineer and mate went down below and I went down in the engine room and took the manifold box adrift—took the valve apart and flushed the pipe clean and saw that the pipe was clear, and they sent word it was all right, and I put the valve in again and they started the pump, and they stopped down there and saw she pumped all right.
Q. Is that the practice you adopt in steamers before loading the cargo to test the suction pipes or strainers?
A. Yes, we always test the suction pipes and strainers; that is the only chance to do anything; if there is any leaks in the hold you can't do anything with the cargo in; as soon as they finish the discharge of the cargo the mate goes down with the chief and sees that the strainers and everything is all right.
Q. On this occasion when you were loading—just before loading

at San Juan, after testing the suction pipes, rose boxes and strainers, were they all right?

A. Yes, sir, they were all right.

Q. During the time you have been aboard of the Julia Luckenbach had you any trouble with the suction pipes or strainers?

A. No, sir.

269 Q. Do you remember the occurrence of the leak in the steamship on Sunday, April 27th, about her springing a leak; do you remember that?

A. Yes, sir, I was on watch.

Q. After the leak was discovered what was done about the pumps on board the steamer?

A. Well, as soon as I discovered the leak I sent the oiler up to call the chief, and I put the pumps on right away.

Q. How did they work?

A. They worked all right.

Q. From the time you first started the pumps up to the time you just about arrived at San Juan, how did the pumps work?

A. They were working good, only we had trouble once in a while.

Q. What was the cause of that?

A. The cause of that was the sugar melting, making the water thick like molasses, and besides that, the bags seemed to cheese out, and when we cleaned out the valves we would find it like oakum in there, bits of oakum.

Q. You mean the bags would kind of rub out—separate and get like oakum?

A. Just like fine oakum.

Q. After the cargo was discharged out of No. 3 and 4 holds at San Juan, when you returned back, did you go down and see about where this leak was?

A. Yes, I was down there, assisting putting the bolt and washer down; the diver went down underneath and put a bolt through and we put the washer on top and screwed it down, and after we finished there the mate and captain filled it up with cement.

Q. Did you notice about this hole, what was the size of it, do you remember?

A. I don't remember the size; I guess it was as far as I could say, it would be about an inch and a quarter one way and I should say it would be three-quarters the other.

270 Q. Could you tell from looking at that hole what was the cause of it?

A. It seemed to me as if she had been resting on something on the outside; seemed to be caved inward.

Q. How did the inward part of the plate look to you when you looked at it?

A. It looked to me like as if she had been aground somewhere and been resting on something, whatever it was, and when we got to sea and she was working up and down in the seaway it finally worked through.

Q. Outside of this sugar and the bagging coming in contact with

the suction pipes and getting into the rose boxes, were the pumps working all right?

A. Yes, sir, they were working all right; this stuff got in every once in a while and we had to stop the pumps and take the valves out and clean them out and start them up again.

Q. Did you have any occasion on the voyage out from New York up to the time you arrived at San Juan, to use the pumps on account of the steamship springing a leak?

A. Not on the voyage down, no, sir.

Q. Do you know why they required to have extra pumps when you arrived at San Juan to help pump out the water in the ship?

A. This sugar melting down like molasses was getting too thick for the pumps, and we were having trouble keeping them going, especially with oakum coming through.

Q. Did you also have to use buckets to pump the water out?

A. Yes, sir, these big coal buckets.

Q. Do you know of your own knowledge whether or not the ship while loading at San Juan lay aground?

A. I heard them talking about she was aground, but of course I couldn't swear to that myself, because I don't know anything about the depths of the water.

271 Cross-examination by Mr. McGrann:

Q. Did you have anything to do with the preparation of this engineer's logbook on April 25th, when this thing occurred?

A. He puts that in.

Q. Whom do you mean; the chief engineer?

A. The way we do we have a slate——

Q. Do you mean when you say "he" puts that in, the chief?

A. Yes, sir.

Q. What do you say about the slate?

A. Down below we have what they call the blackboard, and anything that happens on watch we put on the blackboard and we copy it down in the book or slate and send it up to the chief and he writes it up.

Q. Were you on watch on April 25th while you were lying at the wharf at San Juan?

A. Yes, sir.

Q. Did you make any entry on the slate or any place else about the ship having been aground?

A. No, sir.

Q. I call your attention to this entry of April 25th which appears on the log sheet opposite the figures 5 to 8 A. M. There is an entry which appears as if it had been interlined, ship hard aground at Quartermaster's Dock while loading the last of her cargo; do you recall anything about that, about the circumstances of entering that in the log?

A. I don't recall regarding the making of the entry; it was this way; we were lying at the dock, we don't make no entry or don't make no log up; when we move we make the log out.

Q. You were on watch when you discovered the leak?
A. Yes.
Q. Did you discover it yourself?
A. Yes, sir.
Q. What time was that, do you know?
A. It was about 6.40 or 6.45, as near as I can remember by our time.
Q. What day was that, April 28th?
A. Sunday, yes, sir.
272 Q. What did you do, notify the chief engineer yourself, or send an oiler to him?
A. Sent the oiler immediately.
Q. Was that immediately on discovering it?
A. I told the oiler to go to the chief, and while the oiler went to the chief I started the pumps right away.
Q. When did the chief come down?
A. Right away after I sent him.
Q. Immediately?
A. Yes, sir.
Q. According to the logbook that is entered as 6.40 when you discovered the water, is that correct?
A. About 6.40 or 6.45.
Q. Then you have: "stopped the engines at 7.39?"
A. Yes.
Q. Did you do anything at all with the engines before that 7.39?
A. That is the main engine?
Q. That is what I am referring to?
A. As soon as I discovered the leak I started the pump because that didn't interfere with the main engines.
Q. You kept the main engines going until 7.39?
A. Yes, sir.
Q. How many pumps did you have going in this hold?
A. Three pumps.
Q. Is that all the pumps you had available?
A. That is all the pumps we had; three pumps.
Q. You had no other pumps you could use on that hold?
A. We tried to rig up one of these injectors.
Q. A steam injector?
A. A steam injector.
Q. Why didn't you rig it?
A. We rigged it, but couldn't get it to work on account of the sugar.
Q. Did you have any hand pumps on board?
A. We had one hand pump.
Q. Did you use that?
A. Tried to use it.
Q. Didn't you have any other movable steam pumps?
A. No, sir, we only had the three big steam pumps.
273 Q. That are in the engine room?
A. Yes, sir.

Q. You had no pump in the fire room that could take water from the hold?

A. No, sir, we had no pump in the fire room.

Q. Had you made an inspection of your shaft alley during your watch before 6.40, when you discovered it full of water?

A. Yes, I went down in the shaft alley the beginning of the watch.

Q. What time was that?

A. Four o'clock.

Q. When you went on watch?

A. Yes, sir.

Q. Do you remember distinctly going into the shaft alley?

A. Yes, sir, as soon as we come down to relieve the watch we look at the water in the boiler and see that it is all right, and go around the engine and take a walk around the shaft alley, and see that everything is all right there.

Q. Do you remember having done that on this particular occasion, this Sunday afternoon when you were on watch?

A. Yes, sir.

Q. You are quite sure of that?

A. Yes, sir.

Q. What did you find in that shaft alley?

A. Didn't find anything at all.

Q. Wasn't there any water at all down there?

A. Down by the stern there was a little bit of water in the after well; it takes about three minutes to pump that out.

Q. Did you pump it out?

A. Yes, sir.

Q. Then the shaft alley was dry?

A. Yes, sir.

Q. When did you next go there?

A. The next time was about half past 6.

Q. Was that a regular inspection you were making or was your attention attracted to water running in somewhere?

A. What I had my attention to by then was I was taking a walk around, I just came out of the fire room and came in the engine room, and I hadn't noticed the oiler going into the shaft alley to see the thrust, so I went in to have a look at the thrust, and when
274 I went in I heard a loud noise down in the alley, and I looked and I got a lamp, and as soon as I got the lamp I could see the water down there, and I went along and seen a couple of holes with water squirting through, and as soon as I saw that I knew there was water in the hold, so I went in the engine room and told the oiler to go to the chief, and I went around and started all three pumps.

Q. How deep was the water in the shaft alley at that second inspection that you made that you have just told us about, how much water was there in the shaft alley?

A. It was just about level with the floor, with the boards.

Q. Is there a board walk along there?

A. Yes, sir, we had a wooden flooring.

Q. Are there any openings so you can see down into the bottom skin of the ship?

A. Yes, we had openings along the shaft alley so we could see the water.

Q. And the water was up on the level with the floor?

A. Down where the water was squirting through at the after end.

Q. How high above the floor were those two holes that you spoke about?

A. About nine inches.

Q. About nine inches above the flooring on which you walk?

A. No, from the flooring to the bottom of the shaft alley.

Q. The flooring is about nine inches above the bottom of the shaft alley?

A. Yes, sir.

Q. You spoke of some holes, two holes you saw water running through?

A. Yes.

Q. I want to know how high those two holes were above the flooring on which you were walking in the shaft alley?

A. They were about six or eight inches above the floor.

Q. So that would make them about fifteen inches above the skin of the ship?

A. About fifteen inches above the bottom of the alley.

275 Q. What do you call the bottom of the alley; is that the skin of the ship outside?

A. That has nothing to do with the skin of the ship outside, because there is a keelson, then an upper keel, then the shaft alley boxed in; it is all boxed in.

Q. How high would those two holes be above the bottom of No. 3 and 4 hold?

A. I couldn't exactly say.

Q. Give us your best estimate?

A. Three or four feet.

Q. In other words, there would have to be three or four feet of water get into the hold before it would run through those two holes that you saw?

A. That is what I say; somewhere about that.

Q. What were these holes?

A. There had been a couple of rivet holes or bolt holes, they left the bolts out.

Q. Was the plate corroded around there?

A. No, sir; you see down at the end of the alley there they have plates and they are bolted on, so any time we have any trouble with the shaft, take the tailend shaft out, we can take the plates out and bring the shaft out through the hole.

Q. You didn't know the ship was aground at the dock, did you?

A. I heard the mates talking about it being aground.

Q. You didn't know it?

A. Not myself.

Q. When did you hear them talking about it, after or before you left?

A. At supper time.

Q. Did you have steam on your main boilers while you were at the dock?

A. Yes, sir.

Q. You worked your engines when you got out of the dock in order to get away from the dock?

A. After we got clear of the dock?

Q. Have you any record of when you started working the engines, in the logbook?

A. I don't know what record they have.

276 Q. You wouldn't know?

A. No, sir.

Q. There is no record in the log when you started to work the engines; do you remember of your own knowledge about when you started to work the main engines?

A. You see at this Quartermaster's Dock we are never allowed to move the wheel alongside Quartermaster's Dock.

Q. Why is that?

A. There are a lot of sunken piles sunken down there, and we are always afraid of breaking the blade or something; there might be scrap iron or something.

Q. How do know all this, were you told this yourself?

A. I know that is a rule we always have, we are never allowed to touch the wheel coming away from that dock.

Q. When do you touch the wheel?

A. After they take the vessel out.

Q. How far out?

A. Way clear of the dock altogether; the way you generally come out of that dock you swing the bow out with the anchor; pay out chain and when they are going to leave the dock, haul away on the capstan and haul the ship out.

Q. You work your engines after you get hauled up to the anchor?

A. After they haul the ship away from the dock——

Q. After you get hauled up to the anchor you work your engines and get hauled away?

A. As soon as they haul the ship out clear away from the dock they start to work.

Q. You don't have a tug to haul you away from that dock?

A. No, sir.

Q. Never use a tug to get away from the dock?

A. The first time I ever seen that was this last time.

Q. Did you notice your sea valves were choked with mud; did you get any mud in your condenser tubes or air pumps or

277 anything while you were lying alongside the dock, April 25th?

Mr. Carter: Objected to as incompetent and not within the issues, and not pleaded.

A. We got some mud and stuff in there through the circular.

Q. How did you know that?

A. We knew that by the vacuum.

Q. Your pumps didn't refuse to work, did they?

A. No, sir; but we couldn't get no vacuum.
Q. You did get a vacuum eventually didn't you?
A. After a time she cleared herself.
Q. That is always so when you are in shallow water?
A. Yes, sir, you could see the muddy water coming right through the condenser.
Q. That is the usual thing that occurs when you are in shallow water?
A. Yes, sir.
Q. Do you remember getting any unusual soundings anywhere in the ship about April 20th before you got to Ponce, Porto Rico, soundings of the holds?
A. The soundings we generally used to average was about six—anywhere between six and nine inches.
Q. Above nine inches would you call it an unusual sounding?
A. No, sir.
Q. What would you call an unusual sounding?
A. Well, she would have to be about—anything over nine would be unusual.
Q. That is what I asked you; anything over nine would be unusual?
A. Yes, sir.
Q. And if you get anything over nine you would be requested to pump it out, or ordered to pump it out?
A. Anything over nine, according to the way the ship lays; No. 3 and 4 I used to pump out myself if she was down by the head; that is the best chance of getting the water down, getting it down to three or four inches.
278 Q. You have been on this Julia Luckenbach a long time?
A. Yes, sir.
Q. Three and one-half years?
A. Yes, sir.
Q. What would you consider an unusual sounding in No. 3 and 4 hold under any conditions?
A. Anything over nine inches.
Q. Would be unusual?
A. Yes, sir, would be unusual.
Q. I call your attention to the deck logbook of the Julia Luckenbach under date of April 22, at Aguadilla, where a sounding is shown of thirteen inches in No. 3 and 4 holds at 6 A. M. Do you know anything about that sounding?
A. I have seen it that way often enough; you take any of the old logs and you will see thirteen.
Q. You have said anything over nine was an unusual sounding?
A. Yes, sir.
Q. So you call this an unusual sounding, thirteen inches?
A. If I knew there was that much water in the hold I would put the pump on.
Q. It is something out of the ordinary when you get a sounding of thirteen inches in a cargo hold?
A. Thirteen inches; that was an unusual sounding for us.

Q. You don't recall any circumstances connected with that day and that sounding, do you?

A. No, sir, I don't recall anything.

Q. You don't know whether you were requested to pump it out?

A. Always pump it out of my own accord without being requested, any sounding like that.

Q. You didn't make the sounding in No. 3 and 4 hold?

A. No, sir.

Q. You would have to know about it from the deck?

A. He puts that down on the board and I see it.

Q. Where is that board?

A. In the engine room.

Q. You look at that board and then pump it out?

279 A. He puts on the board the soundings every morning, every noon and every night.

Q. You don't recall this one?

A. No, sir.

Q. When you made this examination you talked about of the strainers and manifolds, and tested the suction of your pumps, did you look at the suction pipe all along its length into No. 3 and 4 holds?

A. I beg your pardon?

Q. You have stated that the examination was made of the strainers and manifolds and the pump was tested to see whether they sucked water?

A. Yes, sir.

Q. Did you see the suction pipe along its whole length in No. 3 and 4 holds up to the strainer at that time?

A. I wasn't down in the hold at all.

Q. You had nothing to do with that?

A. No, sir.

Q. Have you ever seen the whole length of that suction pipe?

A. Yes, sir.

Q. I mean every foot of it?

A. Yes, every foot from one end to the other.

Q. How do you see that?

A. The suction pipes, the after end they run through the shaft alley, and the suction pipes in the forward end run through the engine room and through the cofferdam and come right into the hold.

Q. Have you yourself ever seen that suction pipe inside of 3 and 4 holds?

A. Yes, sir.

Q. When?

A. I have seen it very often.

Q. When?

A. I used to see them generally every trip.

Q. Isn't it true they are covered by the flooring?

A. There is flooring, but the carpenter goes down and pulls up the flooring; the ballast is on the after end of the ship.

Q. Doesn't some of the pipe run under the after end?

A. Not as far as where the ballast is.

280 Q. If it did you couldn't see it on account of ballast?

A. They didn't have none as far aft as that.

Q. If there was pipe under there it couldn't be seen on account of ballast?

A. No, sir.

Cross-examination by Mr. Kneeland:

Q. How far back in your shaft alley does the pipe which is connected with the suctions in the after part of the hold run?

A. I couldn't exactly tell the distance.

Q. It runs within a few feet of the after bulkhead, doesn't it?

A. It is right underneath No. 4 hatch.

Q. Don't you know the pipe runs clear through the shaft alley, almost up to the after bulkhead?

A. Not for the hold.

Q. When it gets back there isn't there a cock and a pipe leading out into the wings and then coming forward; doesn't the pipe that connects with the suctions in the after part of No. 3 and 4 holds run aft through the shaft alley almost back to the after bulkhead which divides the hold from the after peak, then go out to the sides of the ship and then come forward again?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. When did you ever see that pipe aft there?

A. I seen that always there; every day go down in the shaft.

Q. You can see that part of the pipe which is in the shaft alley?

A. Yes.

Q. But you can't see the part which is underneath the floor?

A. Not unless you go down in the hold.

Q. You can't if you go down in the hold?

A. You have to pull the flooring up.

Q. And you have to take the ballast up which is on top of the flooring?

A. No, sir, the ballast is back of that again.

281 Q. Don't you know the ballast runs out almost to the after-coaming of No. 4 hatch?

A. Where the suctions and the suction pipe was—where they come out in the hold that is clear of the ballast.

Q. It is forward of the ballast?

A. Yes, they took the ballast away from aft and boxed it up.

Q. The pipes run aft from the suctions, way aft, and they turn into the shaft alley?

A. Towards the end of the shaft alley, yes, sir.

Q. You mean you have seen the part where the suctions are?

A. Yes, sir.

Q. But you have never seen the line of pipe?

A. I have seen the line of pipe, yes, sir.

Q. When?

A. I have seen it often and often; I couldn't exactly tell dates.
Q. You said you saw them every trip?
A. Yes, sir, I have seen them every trip, too.
Q. Has the ceiling been up every trip?
A. Every trip, as soon as they discharge cargo the carpenter goes down to clean up the holds.
Q. You don't go down?
A. No, but I have to go down several times; I have to go down very often.
Q. You said you had seen the whole length of the piping that connects with the suctions in the afterhold?
A. Yes.
Q. You say you have seen it almost every trip?
A. Almost every trip.
Q. You are positive?
A. Yes, sir.
Q. And the ballast has been in there all that time?
A. Yes, sir.
Q. After you got your pumps on you say they worked well?
A. Yes, sir.
Q. Except that you had to stop and clean out?
A. Yes, sir.
Q. How often did you have to stop?
A. Well, sometimes we had to stop about every twenty or twenty-five minutes.

Q. Weren't your pumps sufficient to have controlled the
282 leak from a hole of that size?

A. Yes, if we didn't have the thick molasses coming through and those cheese bags.
Q. How do you suppose those pieces of bags got down to your pumps and into your suctions?
A. The only way I can see that they got down there was the flooring around there must have opened; I don't suppose there were any old bags there.
Q. The cargo was stowed on top of the ceiling?
A. On top of dunnage wood.
Q. That is with dunnage wood between them and the ceiling?
A. Yes, sir.
Q. How do you suppose the ravelings of those bags got down through the ceiling to your pumps or to your suctions; to your pipes?
A. You see the shaft alley is a box and it is lying down on the bilge on either side; they don't put no cargo over there, and it might have been some of the flooring underneath the shaft alley, water being underneath might have come up and the water and the working up and down of the ship, the bags working together, it must have gone in through that way in underneath the alley.
Q. You couldn't more than hold the water about where is was, could you?
A. That is about all, just about hold it where it was.

Q. It was higher when you got back in San Juan than it was when you started?

A. The bags of sugar were dropping down all the time, sugar was melting underneath, and down would come the next bags from the between decks; every once in a while there wer bags falling down.

Q. Did that make more water in the ship?

A. It makes more displacement for water.

Q. Could you draw me a little diagram showing how those pipes that drain your afterholds run?

A. I guess I could do that.

283 Q. Just the after; 3 and 4?

Witness does as requested.

Q. Where is the engine room?

A. (Witness indicates on diagram.)

Q. This is the cofferdam?

A. Yes, sir.

Q. Where is the after bulkhead?

A. (Witness indicates on plan.)

Q. Do you mean the well is aft of the after compartment?

A. The well is aft of that.

Q. That is in the after peak?

A. The after peak is aft of this again.

Q. You have the well aft of the bulkhead?

A. That is the bulkhead for the hold there (indicating).

Q. There is no bulkhead in the hold, is there?

A. Sure, that is the bulkhead that keeps the hold from the shaft alley.

Q. No. 3 and 4 is all one compartment, isn't it?

A. Yes, sir.

Q. Is this after bulkhead the one that divides the cargo hold from the after peak?

A. That is the ballast tank right overhead.

Q. Where is the No. 4 hatch?

Witness indicates on plan.

Q. How far is this cock in the tunnel from which these pipes lead out to the suctions from the after bulkhead?

A. That would be about 7 or 8 feet.

Q. How near does your No. 4 hatch come to the after bulkhead?

A. It doesn't come as far back; that is the engine room; that is the cofferdam; that is the big between deck here (indicating); there was another hatch here, No. 5 hatch (indicating); right underneath that No. 5 is that tank I am telling you about.

Q. This represents No. 3 and 4?

A. Yes, sir.

284 Q. That is over 90 feet long, isn't it, No. 3 and 4?

A. Yes, sir.

Q. Do I understand these after suctions are way back how far from the after bulkhead?

A. I couldn't exactly swear to the distance from that bulkhead, but I would say from that bulkhead would be about 8 or 9 feet; I couldn't swear to it.

Q. Would you be surprised to learn those after suctions are 50 feet from the after bulkhead?

A. I couldn't swear to the distance, what they are.

Q. After these suction pipes run from the cock in the tunnel out to the wings then don't they lead forward again?

Witness indicates on diagram.

Q. The pipe in the tunnel does run aft within about 8 feet of the after bulkhead?

A. Yes, sir.

Q. Then it goes out to the side?

A. Yes, sir.

Q. Then it leads forward again?

A. It leads to the corner of the hatches.

Q. What is that, the forward corner of the hatch?

A. About under the forward corner of the hatch (indicating).

By Mr. Carter:

Q. Is that where the strainers are then, where it comes out that way (indicating)?

A. That is supposed to be where the strainer is.

By Mr. Kneeland:

Q. That is covered with a little hatch you can take up and look down?

A. Yes, sir.

Q. Didn't these pipes that run forward of these suctions and strainers, didn't they run under the ballast?

A. No, sir, they didn't run under the ballast.

Q. Was it you or the mate that said the ballast ran 40
285 feet forward from the after bulkhead?

A. I didn't say anything about it.

Q. Doesn't it run about 40 feet forward from the after bulkhead?

A. I couldn't swear.

Q. If the ballast ran 40 feet forward from the after bulkhead those pipes must run under that ballast, don't they?

A. I couldn't swear to how far the ballast——

Q. If those pipes did run under the ballast you would not have seen them every trip for the full length?

A. Unless the shaft alley took the full length in there (indicating).

Q. But when it is out in the hold you have not seen the pipes there except the place right around the suctions, around the suctions where the ceiling is made to lift up, sort of a hatch?

A. Where they lift the hatch up.

Q. That is what you mean when you say you have seen all the pipes?

A. Yes, sir.

Q. You are not so certain that you saw the whole length of those pipes every voyage; you seen part of it in the shaft alley?

A. All along the shaft alley I seen that every day.

Q. The parts in the hold you are kind of doubtful about, how much of them you have seen?

A. I have seen the pipes here (indicating).

Q. You have sen the pipes in the shaft alley and around the suctions?

A. I have seen them along here, too (indicating); I won't say I have seen them along here every trip but I have seen these (indicating).

Q. Those pipes run under the ceiling?

A. Yes, sir, they run under the floor; when they clean out the bilges they have to pull the floor up.

Q. How often have you seen the floor hauled up?

A. About a dozen times I guess.

Q. Where was the vessel when you say the floor out?

286 A. At 26th Street, there we had the floor up the whole floor right up.

Q. When was that; where is 26th Street?

A. Around the shop.

Q. When the vessel was hauled out?

A. When she had been hauled out for repairs.

Q. When was that?

A. I can't remember when it was; I have been in there a long time and I have seen them floors hauled up several times.

Q. How often has the vessel been hauled out since you have been aboard?

A. I should say about nine times.

Q. For accidents?

A. No, sir, I won't say accidents.

Q. Just overhauling?

A. Out for overhauling and off charter.

Q. Do you remember when she had a collision over in the basin with the Horatius?

A. Yes.

Q. You didn't have her floor up at that time?

A. I wouldn't swear whether we had it up or not.

Q. That was a year ago in January or December?

A. Last January.

JAMES DALTON, being duly sworn and examined as a witness for the Insular Line, testifies:

By Mr. Kirlin:

Q. Captain Dalton, what ship are you in command of?

A. The steamer Bayamo.

Q. What line is that?

A. The Ocean Freight are the owners of the ship and the charterers are the Insular Line.

Q. For how long have you been trading to Porto Rico?

A. About nine or ten years.

287 Q. How long as master?

A. About that length of time.

Q. Have you been going there regularly?

A. No, I have been out of the trade for about eighteen months or two years.

Q. When were you last in the trade?

A. About three months ago.

Q. Prior to that you have been out of it for——

A. We generally run in the sugar season, and in the off season we are off for a couple of months.

Q. You have been running there regularly except during the off season, is that what you mean?

A. Yes.

Q. And that means the off season of two or three months you don't run?

A. Yes.

Q. How large a ship is the Bayamo?

A. 4,100 dead weight.

Q. What dimensions and draught?

A. 24.4, 24.6 mean.

Q. How big is she?

A. 4,100 dead weight.

Q. How wide?

A. 265 over all, 60.6 beam, if I remember rightly.

Q. Do you know the berth at the Quartermaster's Dock?

A. Yes, sir.

Q. At San Juan?

A. Yes, sir.

Q. You loaded there?

A. Several times.

Q. When, and on what vessels?

A. The last, if I remember rightly, was last April, or the first part of May.

Q. 1913?

A. 1913.

Q. Did you load there in 1912?

A. No.

Q. 1911?

A. No.

Q. You loaded in this ship there in 1913?

A. Yes.

Q. What did you load there before that?

A. The steamship Harry Luckenbach.

Q. When was that?

A. That was in 1910, 1909, 1911.

288 Q. What kind of bottom is there in that——

Objected to as to 1909, 1910, and 1911; we are interested in 1913.

A. I found you could drop a lead down 18 or 20 inches.

Q. You let it go down into the bottom 18 or 20 inches?
A. Yes, sir.
Q. How deep have you loaded there?
A. 24.6.
Q. Any trouble about it?
A. You have got to figure on high water, you can dock down there with it half loaded, 23, 24, 24 6, and have no trouble getting out.

By Mr. Burlingham:

Q. Are you allowed to go out without heaving an anchor first?
A. I have used an anchor and I haven't used an anchor, it is practically up to my own judgment as master.
Q. The rise and fall of the tide was what?
A. It would run anywhere from 14 to 20 or 23 inches, according to the stage.
Q. The usual way of leaving the berth, I suppose, is by heaving the achor?
A. No.
Q. Isn't it?
A. No, I would prefer to drop down on the Porto Rico Line dock; there used to be a shoal off that dock, and if you had too much you could get on that shoal; I always drop down.
Q. You mean you haul yourself down?
A. Back down, the stern, with your lines.
Q. You lie stern out?
A. No, stern down, head up.
Q. And you turn the propeller over and go out in that way?
A. Yes.
Q. You weren't there in 1912 at all?
A. I haven't been there in 1912 at all.

Q. And in 1913 you were there and what did you find
289 the depth of water?

A. I found sufficient water to load the ship with 24 feet, I loaded with 24 feet and came out.
Q. Don't you know they dredged the berth out within a few months of that time?
A. No.
Q. You didn't hear that?
A. I didn't hear that; they built another dock there, they might have dredged at the other dock, but I don't remember that they dredged the Quartermaster's Dock.
Q. Are there any old piles or anything like that further in the berth?
A. There is as a rule, and when the ship is low she will slide off.
Q. Drawing 24 feet or 24 feet 6 you are lying in the mud?
A. Well, sometimes we are lying in the mud; when you get your draught you will drop down 50 or 75, at the Quartermaster's Dock there is a little less water than farther down, and I always considered it best to back down, keep hauling off.

Q. In that berth drawing 24 feet you can't lie afloat at many stages of the tide?

A. I never got any complaint of it.

Q. As a matter of fact you would lie afloat?

A. I never had no trouble, I never had no trouble going out there.

Q. You go out on the high tide?

A. Certainly, if I was loading there; I always favor the tide wherever I am.

Q. In 1910 what tide did you go out on there?

A. 24 6.

Q. And laid in the mud there until the tide rose?

A. No, when the cargo was finished I proceeded to sea, 10, 11, 12 o'clock at night.

By the Court:

Q. What is the rise and fall of the tide in San Juan Harbor?

A. 14 or 15 inches; it varies a little more, perhaps 20 or 21.

290 Q. When you are at this dock drawing 24 feet 6 inches mean at low tide are you or are you not in the mud?

A. Usually on the mud, and we never load a ship at the Quartermaster's Dock at 8, 10 or 12 inches by the stern; I generally haul down 50 feet, and sometimes——

Q. When you went out there with 24 feet 6, even at high tide, did you have to navigate through the mud at all, do you know?

A. Your Honor, it is soft mud.

Q. Under your own steam?

A. Under my own steam, no assistance from the tug; there used to be a bar there, and we would haul off, and on the ledge down there you get 10, 12 inches soft mud.

Q. If you usually do go out with a draught of 24 feet 6, would you or would you not be obliged to wait for high tide?

A. Have to wait to go out with the tide, at high tide.

ALBERT ANTHOR, being duly sworn and examined as a witness for the Insular Line, testifies:

By Mr. Kirlin:

Q. Were you the purser of the Julia Luckenbach at the time she loaded in San Juan and Arecibo, in April, 1912?

A. Yes, sir.

Q. After the ship finished loading at the Quartermaster's Dock in San Juan, did she take on sugar at Arecibo?

A. Yes, sir.

Q. (Handing witness paper.) Is that the bill of lading for the Arecibo sugar?

A. Yes, sir.

Q. Is that weight correctly stated for the amount that was taken on there?

A. There the weight of the sugar is about 250 pounds on deck, and 9,000, that would be 2,250,000 pounds.

291 The bill of lading is offered in evidence. It is marked Exhibit D.

Q. Did you keep a diary showing the work and movement of the ship for the voyage?
A. Yes, sir.
Q. And the hours that you were loaded and when you left, and so on?
A. Yes.
Q. (Handing witness small book.) Is this your diary?
A. Yes, sir.

Mr. Kirlin offers the diary in evidence. It is marked Exhibit E.

Q. At Quartermaster's Dock in San Juan was the vessel on the ground at all, to your knowledge?
A. No, sir.
Q. Did you hear any talk about it?
A. No, sir.
Q. You dined and breakfasted and lunched with the officers?
A. Yes, sir.
Q. And were in constant communication with everybody about there?
A. I was master on the ship.

Cross-examined by Mr. Kneeland:

Q. Where was your room on the Luckenbach?
A. Amidships on the starboard side.
Q. Above the main deck?
A. Yes, sir, right on the main deck.
Q. Did you see any defects in the plating of the ship?
A. Yes, sir.
Q. Describe what you saw?
A. There were two holes in the outside plate, and when we had a little rough weather the water came right in my room, and there was water always on the bottom of my room, and everything was floating.
Q. What was the nature of the hole?
A. It was rusted through.

292 Cross-examined by Mr. Burlingham:

Q. In what part of the ship were the holes?
A. On the main deck on the starboard side, the last room.
Q. Way up above the water line?
A. Yes, sir.
Q. Above the main deck?
A. On the main deck; the officers' rooms lay together on the starboard side, and our room was the last room behind the chief engineer's room.
Q. And outside of your room was the outside of the ship?
A. Yes, sir.
Q. That was well above the water?
A. Yes.

Q. Never, of course, down below water?

A. No, but when we had rough weather the water came right in through.

Q. Those are the only holes you ever knew of in the ship?

A. Yes, sir, only this damage was done down there.

JOHN G. JOHNSON, being duly sworn and examined as a witness for the Insular Line, testifies:

By Mr. Kirlin:

Q. Will you state briefly your training and experience as an engineer?

A. Yes, sir; I have been twenty-five years in business; I was trained as a ship builder, a marine engineer. I have been to sea twelve years as chief engineer and have been, for the last eight years with Messrs. Jacobs & Davis, in this city, as manager of the marine department, before which time I was in the London office.

Q. Were you asked by the Insular Line to examine this vessel when she arrived here after the accident to the sugar?

A. Yes, sir.

293 Q. Where did you see her then?

A. On Shewan's dry dock in South Brooklyn.

Q. When did you go there?

A. On the 28th of May.

Q. Have you got your note book with you?

A. Yes, sir.

Q. Well, consult it.

A. (Referring to note book.) Made a survey May 28th, 1912.

Q. Who else was there when you examined her?

A. Mr. Black and Mr. Johnson and Captain Bagger and two more gentlemen, I forget their names.

Q. You have heard the testimony of these witnesses about the matter. Is there anything material to add, or anything materially different to say about the appearance of the hole, from what has already been said?

A. No, sir, except that the plate was wasted inside and worn to a knife edge.

Q. Mr. Martin testified that, for a distance of about 8 or 10 inches around the hole, the place was somewhat wasted and that it shaved practically down to a very thin point. Some of the witnesses have described it as a knife edge.

A. That is right.

Q. Was there any indication on the external part of the plating that the plate had been dented or that this hole had been broken in from the outside?

A. No, sir; no, sir.

Q. Was the paint disturbed around it?

A. No, it was undisturbed; the plate was in good condition.

Q. The witnesses for the ship have testified that immediately they reached a place of safety after the water was discovered in the hole, a diver went below and, having located the hole, drove a wooden plug

in from the outside, and that when the witnesses subsequently felt the edges of the hole after the plug was removed, it felt as though something had pushed the hole through from the outside; the
294 sharp edges of the plate were sticking inboard. Assume that conditions were as the witnesses stated, and as I have given them to you, would your opinion of the condition be reasonably accounted for by the diver driving the plug in, as has been described?

A. Yes, that would account for it, by driving a plug in through the thin edge of the plate.

Q. But you saw the plate from the inside of the ship and outside?

A. Yes, sir, internally and externally.

Q. And you said there was no evidence of any hole being driven in the plate by external violence?

A. No, no.

Q. It has been testified that the ship left Aricebo bound for New York with a draft of 25 feet 9 aft and 24 feet 10 forward, and that her submersion was one inch for each 27 tons of 2,240 pounds. Assuming that in the draft at Aricebo there was included 2,250,000 pounds of sugar taken on at that port. Have you computed what the draft would have been before that Aricebo sugar was taken on board?

A. Yes, sir, about 22 feet 2½ inches.

Q. That is mean draft?

A. That is mean draft, yes.

Cross-examined by Mr. Kneeland:

Q. Did you examine the piping on this survey?

A. Yes, on that day there was only one that we could examine.

Q. That was which one?

A. The starboard side, on the forward deck.

Q. Did that have a rose box on?

A. No, there was no rose box at that time.

Q. Did you subsequently see a rose box there?

A. No, I was called out of town then, and my assistant went.

295 Q. You didn't go again?

A. No, sir.

Q. What, in your opinion, would cause the condition of this plate that you saw; what was the cause of the wasting away of the plate?

A. Well, it was probably due to a mixing of the sugar and salt water and the cement having been broken away some time and the mixture getting in behind.

Q. Have you known of other cases like that?

A. Yes, we had the steamer Beacon Light. She had several hundred rivets, and the caulking that was badly started. She was carrying molasses in bulk.

Q. You saw the extent of the wasting?

A. Yes, sir.

Q. How long a period would it take, in your opinion, for sugar mixed with bilge water to have resulted in that much corrosion to the plate?

A. In a ship of her age not more than twelve months.

By the Court:

Q. What is there peculiar in a ship of her age? Why isn't the iron just as capable of resisting corrosion in a ship twenty years old as in one two years old?

A. Well, the skin of the hole had been penetrated with bilge water generally, and in opening up this surface, a slight rust formed over the plate, and this mixture of salt water and molasses would do it more rapidly than it would if it had been protected by the cement.

By Mr. Burlingham:

Q. Is that estimate of yours based on experience, or theory?

A. On experience.

Q. The twelve month's estimate?

A. Oh, no; I beg your pardon. It was in the Beacon Light. She was not twelve months under water when she had this trouble; she was carrying cargoes of molasses in bulk at the time.

296 Q. And you think that had happened within twelve months?

A. Yes.

Q. And that is the basis of your statement?

A. That is the basis of my statement.

Q. And the only basis?

A. Yes, the only basis.

Mr. Kirlin: I offer in evidence, from page 379 of the Tide Tables for 1912 the record that the mean range of tide from San Juan to Porto Rico was 1.1; spring tide was 1.3, and neap tide 0.9.

I offer in evidence deposition of Frank W. Dow, taken de bene esse.

I offer in evidence letter from the Luckenbach people to the Insular Line, dated April 13, 1912, bearing on instructions that the master had with regard to loading.

It is marked Exhibit F.

Mr. Kirlin: I also offer in evidence this telegram from the agent of the Insular Line at San Juan to the Insular Line at New York, dated December 23, 1913:

"Rising (that is, the tide was rising at 10.10 P. M. on the night of April 25, 1912) 4 A. M. (this was the first high tide after 10.05 P. M., April 25, 1912), light load 23.6. July voyage 59, left Quartermaster's Wharf 29,000 bags; July voyage 60, with 25,000 bags; July voyage 61, with only 24,000 bags."

Voyage 61 being the voyage in question.

297 *Deposition of Frank W. Dow, Taken on Behalf of the Insular Line, Before Edward H. Carpenter, Notary Public, at the Office of Messrs. Convers & Kirlin, No. 27 William Street, New York, December* 18, 1913.

NEW YORK, December 18, 1913, 4 o'clock p. m.

Present:

Messrs. Convers & Kirlin (Mr. McGrann), for the Insular Line.

Messrs. Kneeland, Harison & Hewitt (Mr. Kneeland), for the libelant.

Peter S. Carter, Esq., and
C. C. Burlingham, Esq., for the Julia Luckenbach.

It is stipulated that the testimony may be taken by a stenographer, his fees to be taxable; signing, certification and filing waived; a copy of the deposition to be served on proctors for the libelant and proctor for the Julia Luckenbach.

FRANK W. DOW, called on behalf of the Insular Line, being duly sworn, testifies:

Direct examination by Mr. McGrann:

Q. Captain, what is your present occupation?
A. Mariner.
Q. How long have you been going to sea?
A. Twenty-five years.
298 Q. Do you hold any licenses? if so, what are they?
A. License as master on all oceans.
Q. From whom?
A. The original license was Baltimore, Maryland; the last renewal is New York.
Q. That is, United States Inspectors?
A. United States Inspectors. Also all the Coast Pilot's license—from Boston to Jacksonville, including the island of Porto Rico.
Q. Are you in command of a vessel at present?
A. Yes.
Q. What is it?
A. The steamship Borinquen.
Q. What are her general dimensions? Can you state them?
A. What? Tonnage, you mean?
Q. Yes, tonnage, length and beam?
A. Gross tonnage is 2,552, I think; net 1,992. She is (I couldn't say exactly) about 255 on the keel, I think; with about 43 feet 6 beam.
Q. Single or twin screw?
A. Single screw.
Q. What other vessels have you commanded besides the Borinquen?
A. The one before this was the steamship Richmond, of the Atlantic Coast Lumber Corporation of New York.
Q. When did you take command of the Borinquen?
A. About the 25th of April, 1912.
Q. Have you been trading to San Juan, Porto Rico?
A. Yes.
Q. How often have you been to Porto Rico?
A. Nearly, on an average, once a month.
Q. Have you ever been alongside of Quartermaster's Dock, San Juan Harbor?
A. Yes.
Q. In what vessel?
A. In the Borinquen.

Q. How did you make fast there? Which side to the dock?
A. Port side.
Q. Is that the usual way?
A. Yes.

Mr. Burlingham: You mean port side to the dock?
Mr. McGrann: Yes.

299 Q. That would be bow in?
A. In harbor; up river, you might say.
Q. What is the greatest draft you had alongside of that dock?

Mr. Carter: Objected to as incompetent and not binding on the claimant, in reference to what this witness might know about the draft at the dock. He was not there at the time of the Julia Luckenbach being at the dock on the 24th and 25th of April, 1912.

Mr. McGrann: It has not appeared.

A. The greatest draft I have ever taken out there is 23 feet 11.
Q. When was that, approximately?
A. As well as I recall, February 20, 1913.
Q. Have you been there in April, 1912, or previous to that?
A. April, 1912? I can't say rightly that I have; I would not say whether it was April or May. We were there in 1912; it was in April or May; but I couldn't state which from my mind.
Q. Have you ever been there when the Julia Luckenbach was in port?
A. I was in port in company with her, yes.
Q. Who was in command?
A. At that time, Captain Pennington.
Q. Do you know Captain Rodick?
A. No, not personally.
Q. At any rate, you were there when Captain Pennington was in command of the Julia Luckenbach?
A. Yes.
Q. And when the Julia Luckenbach was in the harbor of San Juan?
A. Yes; we were both in port at the same time.
Q. Have you been alongside of this Quartermaster's Dock at other times besides this time?
A. Yes; I have been there at the dock several times.
300 Q. How often have you been there during your command of the Borinquen?

Mr. Carter: Objected — on same grounds as previously stated.

A. I couldn't say. I suppose at least half a dozen times. I couldn't name them out of my mind.
Q. Do you make ordinarily voyages of going down to the islands and back again?
A. Yes.
Q. How often do you make that round trip?
A. At present we make them once in every four weeks.

Q. Is that about the time you have always taken?

A. That was the time we were making at that time. Except this last three months, I guess, they put us on three weeks; but up to that time we have always been running, leaving New York every fourth Saturday.

Q. Have you ever seen any dredging being done alongside of the Quartermaster's Dock at San Juan?

Mr. Carter: Objected to as incompetent.

A. No. I have not seen any dredging around there any time there.

Q. Were the depths of water alongside of the Quartermaster's Dock the same in February, 1913, so far as you know, as they were in April, 1912?

Mr. Carter: Objected to as incompetent and not binding on the claimants; not shown that the condition of the tide and the bottom of the river were the same in April, 1912, when the Julia was there; and whatever condition existed in February, 1913, or during that year, or the latter part of 1912, is incompetent.

A. As far as I know, they were.

301 Q. You had occasion to know the depths of water about April, 1912, had you?

Mr. Carter: Objected to on same grounds.

A. I had occasion to know it?

Q. Yes. I understood you to say in a previous answer that you had been there about that time?

A. Well, yes, we have. I couldn't say just what date. If I am not mistaken, it was the first trip this ship went there, and I think we sailed from here about February 20th or 22nd of that year, 1912, for San Juan; and it was within a couple of weeks after that that I made the first trip there; I went to the Quartermaster's Dock and took in 10,000 bags of sugar. The ship was stark light when she went to the dock; we went in there light at that time.

Q. When you went?

A. Yes.

Q. And then you continued going there from that date on?

A. Off and on, yes. Sometimes we skipped a trip; sometimes we would go every trip.

Q. On this occasion where you had the 23 feet 11 inches draft were you afloat?

Mr. Carter: Objected to on same grounds as previously stated.

A. I could not say that we were entirely afloat, but the ship was all easy. She was not resting on the bottom. That is, she may have been in soft mud, because I had no trouble whatever in getting her out of the dock.

Q. How did you leave the dock on that occasion?

A. I hove her off on my anchor.

Q. Is that the usual way of going in there?

A. That is the usual way of going into that pier.

Q. Did you have any tugboats?

A. No.

302 Q. What is the character of the bottom alongside of the Quartermaster's Dock?

Mr. Carter: Objected to as incompetent and not binding on the claimants.

A. Very soft bottom at that time.

Q. Have you ever seen indications from the soundings there or otherwise of what the bottom is?

A. I have seen on the lead and lead line. That shows very soft bottom; very soft mud.

Q. Explain how that is shown on the lead line.

A. In taking soundings, for instance, when the lead goes down with the weight of it, it went down—well, possibly a couple of feet or so; and the way I could tell was by the marks of mud for at least two feet or more on the lead line. That was the only way I could tell it was soft bottom.

Q. Is the bottom uniformly soft mud or were there also hard spots?

A. As far as we sounded we found all about the same.

Q. When you were there and had this draft of 23 feet 11 inches, you say that you were not resting on the bottom, I believe you put it?

A. Yes; that is, we were not resting hard on the bottom.

Q. Do you know whether or not you touched bottom at that time?

A. No, I couldn't say positively whether we would or not. There were no indications that we touched the bottom the way she came out. She came off just the same as if she was afloat. That is, in pulling her off with the anchor, which we always do, I had no more trouble in getting her to come off with that than I did at other times having half cargo in. Therefore I would not think she was very hard on the bottom.

Q. Suppose that on any of these occasions you had seen the indications of touching the bottom, was there any manner in which you could have remedied the conditions?

303 Mr. Carter: Objected to as incompetent, and not binding on the claimants; and as to the question of the depth of water and the manner of going to dock and what the ship did, that is within the control and management of the Insular Line as charterers of the steamship Julia Luckenbach under the terms and conditions of the charter party.

Q. I might add there: By maneuvering or handling the ship at the time?

A. In the way of keeping her from touching bottom, you mean? The only way that I could keep her from touching bottom was to stop loading any deeper. That was the only way I could stop touching bottom.

Q. Did you ever have occasion to breast the ship out while you were lying at Quartermaster's Dock?

Mr. Carter: Objected to.

A. No.

Q. Is that practical—to breast the ship away from the dock?

Mr. Carter: Objected to.

A. I have never seen anybody there do it.

Q. (Chart shown witness.) I show you this Insular Line "Exhibit B" of April 5, 1913, and ask you if the position indicated by the letters in lead pencil "A B" represent the Quartermaster's Dock at San Juan as it was at the time you have testified that you loaded to 23 feet 11 inches draft?

Mr. Burlingham: Of course you are not trying to prove by that what the draft was?

Mr. McGrann: No. The location of the dock was the question.

Mr. Burlingham: You had better exclude that.

304 A. That is the position of the Quartermaster's Dock. But that is the position of the Quartermaster's Dock now.

Q. When you have testified you have referred to this dock?

A. Just this straight line of dock.

Q. Bulkhead?

A. Yes, bulkhead.

Q. And you lay there with your bow at "B"?

A. Yes, at "B."

Q. And the stern at "A"?

A. Yes.

Cross-examination by Mr. Carter.

Q. This steamhsip Borinquen, what is the draft of your vessel? What is the draft of that vessel light?

A. Light?

Q. Yes.

A. What do you mean? Fore and aft?

Q. Yes, certainly.

A. Forward draft and aft?

Q. Yes.

A. With the coal in that we have at San Juan?

Q. Yes.

A. Down there it is the usual draft, about 14 feet 6 aft and about 8 forward.

Q. When you went there on February 11, 1913, you say you were drawing when you got out of there 23 feet 11 inches?

A. Aft.

Q. Aft. How much forward?

A. 20 feet 3.

Q. How much cargo had you on board? Full cargo?

A. No. We had—I couldn't say exactly—about 27,000 bags of sugar.

Q. 27,000?

A. Yes. In fact, we were within 5,000 of our load.

Q. When you went there to load at San Juan on February 11, 1913, did you go there on a rising tide?

A. I couldn't say. There is such small tide there we don't notice the tide in San Juan at all.

Q. When you left you left at high water?

A. I couldn't say whether it was high or low.

Q. What time was it you went there when you loaded 10,000 bags?

A. Which?

305 Q. What time was it you went there when you loaded the 10,000 bags you spoke of?

A. What time?

Q. Yes. Was that in 1912?

A. That was in 1912.

Q. What time? April or May?

A. Somewhere around the 1st of April; I couldn't say exactly.

Q. Did you load those 10,000 bags only or did you have them on board, which?

A. We loaded them.

Q. You loaded them?

A. Yes.

Q. And then you left?

A. Then we left.

Q. Captain, you know as a practical navigator (I suppose you do) that by simply dropping your lead and getting the indications of the state of the bottom by the lead—that was what you used, did you?

A. No. We used then the hand lead.

Q. What do you use with the hand lead to tell?

A. We don't use anything.

Q. You depend upon the lead to penetrate whatever is on the bottom?

A. Yes, when it is soft bottom.

Q. That is not an exact guarantee as to the condition of the bed of a river or alongside of a dock—simply the fact that you bring up mud—to tell you the exact condition of the bottom?

A. That is the usual proof—when you can see what the color of the bottom is and what kind it is.

Q. Does that tell you whether there are any iron, or rocks, or stones—anything else than mud?

A. It does not.

By Mr. Burlingham:

Q. At what draft can a vessel always lie afloat at that particular dock, the Quartermaster's?

A. Well, I couldn't say. Properly afloat, you mean?

Q. Yes.

A. Without touching bottom?

306 Q. Yes.

A. That I couldn't say.

Q. You have been there so many times you can give us your judgment on it?

A. She will lie safe—according to my idea she will lie safe at 24 feet.

Q. That is your limit?

A. I will say 24; that is my idea.

Q. You were within an inch of that—of safety?

A. Yes.

Q. Or danger, either?

A. I will say 24 feet.

Q. You would not risk loading her up to 24 feet at that berth? Is that it?

A. I don't know. You ask what was safe to load in; and I say 24 feet just offhand.

Q. That was not my question. My question was what draft can a vessel lie at the Quartermaster's Dock in San Juan always afloat? That was my first question. What do you say as to that?

A. What she can lie in? That I say I don't know—what she can lie in afloat.

Q. You drew 23 feet 11, did you?

A. Yes.

Q. And you were about 2 feet in the mud, were you, at low water?

A. I didn't say so. No.

Q. Were you in the mud at all?

A. I couldn't say. I couldn't see down there.

Q. Can't you tell whether you were afloat or whether you were in the mud?

A. Can't I tell?

Q. Yes.

A. How?

Q. Couldn't you tell that at the time?

A. With the ship lying perfectly quiet in the dock? How am I going to tell?

Q. Why did you have to use your anchor to get out of there?

A. Simply because there is no way to work the ship out unless you take a towboat in addition from the dock.

Q. If she is lying afloat you can?

A. No. Not in docks. The condition of the docks is such that you can't get her out under her own steam unless you pull
307 her out with the anchor or have a towboat to pull her head off. That is why we use anchors.

Q. Did you take soundings every time you went to that place?

A. No.

Q. Only on one occasion?

A. Yes.

Q. And when was that? In February, 1913?

A. I would not say to that; I couldn't answer that question—which trip it was.

Q. About when? Was it your first trip or one of your later ones?

A. If I am not mistaken, it was the same trip that I had this deep draft, and that was February, 1913.

Q. And what was the occasion of taking the soundings? Because you had such a deep draft?

A. Because I was loaded down deep, and I wanted to see how much water we had.

Q. Although you took soundings you are unable to say now how much water there was?

A. I didn't say that.

Q. How much was there?

A. How much water?

Q. Yes.

A. It was give to me; I didn't take the soundings myself; it was given by my first mate.

Mr. Burlingham: I don't want what your first officer had. I move to strike that out.

Witness: I am speaking about soundings. How many masters take soundings themselves?

Q. Captain, you can't run this in your own way.

A. I don't know why I am pushed through all this, though, anyway.

Q. You are not able to state how much water there was there?

A. Not from personal soundings myself, no.

Q. All you know is as to the character of the bottom, which you pronounce to be mud?

A. I saw on the lead—I saw that is the color of the bottom and the character on the lead myself from the first officer's soundings.

308 Q. You took the ship out from there, I suppose?

A. Yes.

Q. On that occasion?

A. Yes.

Q. You don't know whether you were always afloat or whether you were in mud, do you?

A. She may have been in mud, but she was not in very hard. There was no pulling called for to get her out. She came out just the same as if she was afloat.

Q. Don't you know the difference between being always afloat and resting on mud?

A. No. I answered that question to you before.

Q. There is no difference to you?

A. In mud? No. You can't tell whether the ship is really on the bottom in soft mud or whether she is afloat. I can when she is on hard bottom, but I can't when it is perfectly soft mud.

Q. A few minutes ago you spoke about 24 feet being a limit of some sort. What did you have in mind?

A. Being a limit?

Q. You said about 24 feet.

A. I said to be safe.

Q. Would it be safe at 25 feet?

A. At 25? I can't say. Under the circumstances of the bottom I have not loaded the ship at 25.

Q. Would you say 25 feet 6?
A. Yes.
Q. Would 25 be the limit?
A. Yes.
Q. You think that is the limit of safety?
A. I think that the limit.
Q. Of safety?
A. That I would consider safe in my ship.

By Mr. Carter:

Q. Why did the chief officer put the lead over when you arrived at the dock on February 11, 1913—or the 20th—to find out the depth of water?
A. Because I told him.
Q. Why did you do that?
A. Because we were loading deep, and I wanted to see
309 what water there was at the dock—which I generally do at every dock.
Q. Did the representatives of the Insular Line tell you to do so before you loaded?
A. No.
Q. What made you distrustful about the condition of the Quartermaster's Dock for loading?
A. Every strange dock I go to I do the same thing for the interests of my owners.
Q. Were you then in the employ of the Insular Line?
A. Yes, I was in the same ship I am in now.
Q. They are the owners, are they, of that steamer?
A. No; they are the charterers. The owners are the Ocean Freight Line.

By Mr. Kneeland:

Q. Captain, I understood you to say that your first visit to San Juan was about February, 1912?
A. About that; the latter part of February or the first of March.
Q. Am I right in understanding that you testified that you took command of the Borinquen in April, 1912?
A. April what?
Q. You were wrong?
A. No. I think you were right there. You understood me to say 1912?
Q. Yes.
A. In April?
Q. Yes.
A. Yes.
Q. Then how did you happen to be in San Juan in February?
A. I was mate of the ship.
Q. That is what I want to know.
A. I was mate of her.
Q. How long were you on the Borinquen as mate before you became her master?

A. Two trips to San Juan; I was in her from November to February—I was first officer from November, 1911, till April, 1912, I was first officer; and from that time till the present master.

Q. Do you know what the rise and fall of the tide is in
310 San Juan?

A. No. About on an avearge, I understand from the people down there—from engineers—about a foot. The tide works there, I understand, according to the wind.

Q. You never had occasion to load deep enough there before this occasion to take soundings?

A. No.

Q. Before this occasion in February, 1913?

A. No.

Q. And in regard to this 24 feet that you testified to, you mean that you knew that your ship would be safe at 24 feet?

A. Yes.

Q. And you never loaded her deeper than that; so that you don't know how much more she could stand and be safe?

A. No.

Redirect:

Q. Captain, do you know of any hard substances, or rocks, or iron, or anything of that sort on the bottom around the Quartermaster's Dock?

Mr. Carter: Objected to as leading.

A. Not to my knowledge. There is nothing of that kind.

Recross by Mr. Burlingham:

Q. Did the soundings taken by your chief officer agree with these on the blue-print?

A. I have not looked at the blue-print.

Q. What?

A. I have not looked at the soundings on the blue-print.

Q. Were they entered in your logbook?

A. No. That was not taken as official.

Q. Have you a log in port here?

A. I have a log aboard ship. Yes.

Q. Have you the log for that time?

311 A. A log for every voyage she has made. (Witness refers to Government Chart Exhibit B of April 5, 1913.) They have got no soundings here right alongside of the dock. (Indicating.)

Q. Where is the dock?

A. There it is (indicating). There are soundings way off here (indicating). I didn't sound out there. I couldn't go outside of the width of the ship to ascertain what water is out there.

Q. Is your chief officer on board still?

A. Yes.

Q. Same chief officer?

A. Yes, the same one.
Q. What is his name?
A. Tonnesan.
Q. Norwegian born, is he?
A. I think he is Norwegian, yes.

By Mr. Kneeland:

Q. Did you know what the soundings were?
A. No, I didn't take soundings myself.
Q. You only know what your chief officer told you?
A. That is all I know about the soundings.
Q. What did your chief officer tell you about soundings?

Mr. McGrann: I object to that, unless the Captain knows himself what the soundings were.

A. I don't know myself personally, because I didn't handle the line.

Mr. Kneeland: The question is withdrawn if it is objected to.
Mr. Burlingham: I object to its being withdrawn.
Mr. McGrann: I would be very glad to have the Captain himself testify to these soundings if he knows himself what they are; but I object to having any speculative soundings stated.

312 By Mr. Burlingham:

Q. When are you going to sea?
A. I don't know just exactly whether it will be to-morrow night or Saturday morning.
Q. Is Tonnesan going with you?
A. I expect so.

Fred L. Worke, being duly sworn and examined as a witness for the Luckenbach, testifies:

By Mr. Burlingham:

Q. Have you and Mr. Martin made a diagram in accordance with his Honor's suggestion?
A. Yes.
Q. It was in conference that you made it?
A. Yes, sir.
Q. Is it correct?
A. It is correct as far as I am able to say.
Q. From your knowledge of the boat you say that is a correct diagram, do you?
A. Yes.
Q. I notice that you mark five boards as removable. Is that true?
A. That is three inboards and two outboards.
Q. Did you say that yesterday?
A. I couldn't say whether I was examined on that point or not; but it is the fact that three inboards and two outboards on each side of the shaft tunnel were removable.

Q. That is right, is it?

A. Yes, sir.

The diagram is marked Exhibit D*a*. being the one made by Messrs. Martin and Worke, at the request of the Court.

Mr. Kirlin: I offer in evidence the letter to which the cable was an answer.

It is marked Exhibit H.

Testimony closed.

Counsel summed up the case.

(Here follows diagram marked page 312½.)

312½

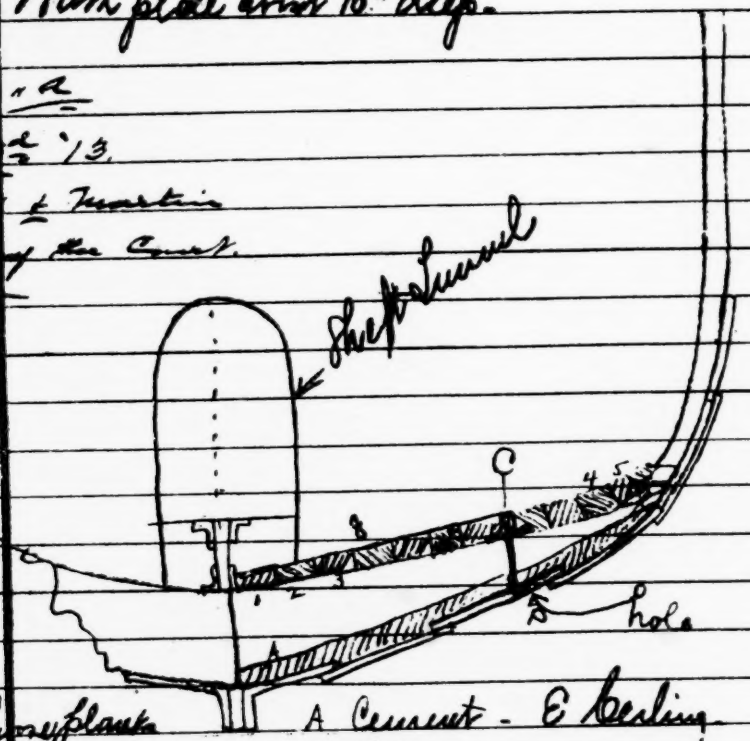
Wash plate about 10" deep.

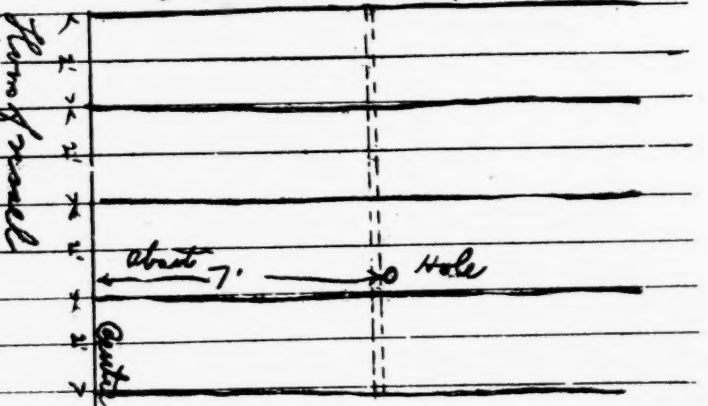
Exp. "A"

Ex. 2 1/2 '13.

Wm. Hart & Martin

a majority of the Court.




No 711
Lankabeach
v
McCrahan Sugar Refining Co
} p 312 1/2

313 LIBELANT'S EXHIBIT 1.

Federal Insurance Company.

Policy No. 15,239.

Dated September 1, 1909.

"Szarnikow-Rionda Company. For account of whom it may concern. Loss, if any, payable to them or order.

To cover three-fifths interest in all shipments, their own or consigned to them or to bankers or to others for their account or in which they may have an interest, also covering merchandise sold by Mess. Czarnikow-Rionda Company, for account of others and consigned to them or to bankers or others except only such shipments as they may be instructed not to insure. Merchandise sold 'Cost and Freight' not to be covered under this policy. On merchandise, specie, bullion and currency including advanced freight, if any" * * * "Per steamer or steamers sailing on and after September 1st, 1909.

To be insured, lost or not lost, at and from port or ports in Cuba, Porto Rico and West Indies generally" * * *

"And warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

Memorandum attached, dated, May 10, 1910.

"It is hereby understood and agreed that the within policy covers for one-half interest instead of as heretofore.

This agreement to take effect as regards all shipments by steamers sailing on and after May 10th, 1910. All other terms and conditions remaining unchanged."

314 LIBELANT'S EXHIBIT 2.

Marks and Nos. —.

$98,000.

No. 151494.

Federal Insurance Company,

Chubb & Son, Managers.

5 and 7 South William Street, New York.

NEW YORK, May 2nd, 1912.

This is to certify, that on April 18th, 1912, this Company insured under Policy No. 15239 for Szarnikow-Rionda Co., the sum of

Ninety-eight thousand dollars in gold, on 16,620 bags sugar, valued at $196,000, shipped on board of the S/S Julia Luckenbach, at and from Porto Rico to New York, including risk of craft in and from the vessel. Each lighter or craft to be considered as if separately insured, and it is hereby understood and agreed, that in the case of loss, such loss is payable to the order of Czarnikow-Rionda Co., at New York, on surrender of this Certificate.

This Certificate represents and takes the place of the Policy, is subject to all the terms thereof, and conveys all the rights of the Original Policyholder (for the purpose of collecting any loss or claims), as fully as if the property was covered by a special Policy direct to the holder of this Certificate, and free from any liability for unpaid premiums.

Including risk on dock while awaiting shipment and after discharge until warehoused.—A. G. P.

CHUBB & SON,
*Managers.*

Countersigned,
A. G. POELLER.

*Certificate of Insurance.*

It is hereby understood and agreed, that in all cases of loss or damage happening to the interest insured under this Certifi-
315 cate, the same shall be reported promptly to the Sea Insurance Company, Limited, Liverpool, or to the nearest Agency of the company, (see list printed on back of Certificate.)

In case of Particular Average Underwriters to pay for such damage as is found to be allowed to the Refiners as shown and determined by the Samplers of the Refiners and those of the Assured provided the same amounts to ($150). A. G. P.

It is hereby agreed, that any loss or claim under this Certificate, shall be paid at the offices of The Sea Insurance Company, Limited, Exchange Buildings, Liverpool, or at any Agency of the company, if so agreed when the Certificate is issued. (See list on back hereof.)

Exchange fixed by agreement at:

Four and 95/100 (4.95) American Gold to the £ Sterling.

Five Francs six and one-quarter Centimes (F. 5.06¼) to the dollar.

Ninety-eight cents per Four Reich-Marks.

Forty-two cents to the Florin.

Forty-nine cents to the Austrian Gold Gulden.

Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance.

NOTICE.—To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom.

(Endorsed:) Pay to the order of W. J. McCahan S. R. Co., Philadelphia. Czarnikow-Rionda Company, Rafail Levallos, Assistant-Treasurer. The W. J. McCahan Sugar Refining Co. W. J. McCahan, Jr., Assistant-Treasurer.

316 LIBELANT'S EXHIBIT 3.

Marks and Nos. —.

$49,250.

No. 151539.

Federal Insurance Company.

Chubb & Son, Managers.

5 and 7 South William Street, New York.

NEW YORK, May 6th, 1912.

This is to certify, that on April 18th, 1912, this Company insured under Policy No. 15239 for Czarnikow-Rionda Co., the sum of Forty-nine thousand two hundred and fifty dollars in gold, on 8,380 bags sugar, valued at $98,500, shipped on board of the S/S Julia Luckenbach, at and from Porto Rico to Philadelphia, including risk of craft to and from the vessel. Each lighter or craft to be considered as if separately insured, and it is hereby understood and agreed, that in the case of loss, such loss is payable to the order of Czarnikow-Rionda Co., at New York, on surrender of this Certificate.

This Certificate represents and takes the place of the Policy, is subject to all the terms thereof, and conveys all the rights of the Original Policyholder (for the purpose of collecting any loss or claims), as fully as if the property was covered by a special Policy direct to the holder of this Certificate, and free from any liability for unpaid premiums.

Including risk on dock while awaiting shipment and after discharge until warehoused.—A. G. P.

CHUBB & SON,
*Managers.*

Countersigned,
A. G. POELLER.

*Certificate of Insurance.*

It is hereby understood and agreed, that in all cases of loss or damage happening to the interest insured under this Certifi-
317 cate, the same shall be reported promptly to the Sea Insurance Company, Limited, Liverpool, or to the nearest Agency of the company, (see list printed on back of Certificate.)

In case of Particular Average Underwriters to pay for such damage as is found to be allowed to the Refiners as shown and determined by the Samplers of the Refiners and those of the Assured provided the same amounts to ($50). A. G. P.

It is hereby agreed, that any loss or claim under this Certificate, shall be paid at the offices of The Sea Insurance Company, Limited, Exchange Buildings, Liverpool, or at any Agency of the company, if so agreed when the Certificate is issued. (See list on back hereof.)

Exchange fixed by agreement at:

Four and 95/100 (4.95) American Gold to the £ Sterling.

Five Francs six and one-quarter Centimes (F. 5.06¼) to the dollar.

Ninety-eight cents per Four Reich-Marks.

Forty-two cents to the Florin.

Forty-nine cents to the Austrian Gold Gulden.

Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance.

NOTICE.—To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom.

(Endorsed:) Pay to the order of W. J. McCahan Sugar Refg. Co., Philadelphia. Czarnikow-Rionda Co., B. Brayn Rionda, Treasurer. The W. J. McCahan Sugar Refining Co. W. J. McCahan, Jr., Assistant-Treasurer.

318 LIBELANT'S EXHIBIT 4.

Marks and Nos. —.

$3,500.

No. 153769.

Federal Insurance Company,

Chubb & Son, Managers.

5 and 7 South William Street, New York.

NEW YORK, May 8th, 1912.

This is to certify, that on April 18th, 1912, this Company insured under Policy No. 15239 for Czarnikow-Rionda Co., the sum of Thirty-five hundred dollars in gold, on 620 bags sugar, valued at $7,000, shipped on board of the S/S Julia Luckenbach, at and from Porto Rico to Philadelphia, including risk of craft to and from the vessel. Each lighter or craft to be considered as if separately in-

sured, and it is hereby understood and agreed, that in the case of loss, such loss is payable to the order of Czarnikow-Rionda Co., at New York, on surrender of this Certificate.

This Certificate represents and takes the place of the Policy, is subject to all the terms thereof, and conveys all the rights of the Original Policyholder (for the purpose of collecting any loss or claims), as fully as if the property was covered by a special Policy direct to the holder of this Certificate, and free from any liability for unpaid premiums.

Including risk on dock while awaiting shipment and after discharge until warehoused.—A. G. P.

CHUBB & SON,
*Managers.*

Countersigned,
A. G. POELLER.

*Certificate of Insurance.*

It is hereby understood and agreed, that in all cases of loss or damage happening to the interest insured under this Certifi-
319 cate, the same shall be reported promptly to the Sea Insurance Company, Limited, Liverpool, or to the nearest Agency of the company, (see list printed on back of Certificate.)

In case of Particular Average Underwriters to pay for such damage as is found to be allowed to the Refiners as shown and determined by the Samplers of the Refiners and those of the Assured provided the same amounts to ($150). A. G. P.

It is hereby agreed, that any loss or claim under this Certificate, shall be paid at the offices of The Sea Insurance Company, Limited, Exchange Buildings, Liverpool, or at any Agency of the company, if so agreed when the Certificate is issued. (See list on back hereof.)

Exchange fixed by agreement at:

Four and 95/100 (4.95) American Gold to the £ Sterling.

Five Francs six and one-quarter Centimes (F. 5.06¼) to the dollar.

Ninety-eight cents per Four Reich-Marks.

Forty-two cents to the Florin.

Forty-nine cents to the Austrian Gold Gulden.

Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance.

NOTICE.—To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom.

Endorsed:) Pay to the order of the W. J. McCahan S. R. Co. Czarnikow-Rionda Co., (Name Illegible.) Vice-President. The W. J. McCahan Sugar Refining Co., W. J. McCahan, Jr., Assistant-Treasurer.

320 LIBELANT'S EXHIBIT 5.

NEW YORK, August 15, 1912.

Received from the Federal Insurance Company, Twenty-three hundred four and 16/100 dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about — ——, 190–, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

$2,304.16.

Description of property:—Sugar.

L. H. M./W. E.

20507.

The original of this and of the other receipt taken by the Federal Insurance Company have inadvertently been mislaid. The original exhibits will be filed as soon as found.

LAWRENCE KNEELAND.

321 LIBELANT'S EXHIBIT 6.

#49. Original.

John M. Talbot & Co., Agents.

Marine Department, Ætna Insurance Company, 63-65 Beaver Street, New York.

PHILA., Aug. 27, 1912.

Received from the Ætna Insurance Company Ninety seven hundred twenty-three & 68/100 Dollars, as a loan and repayable only to the extent of 3/32 any net recovery we may make from any carrier, bailee or others on account of loss to our property [described below] due to damage at sea on or about April 29, 1912 or from any insurance effected by any carrier, bailee or others on said prop-

erty, and as security for such repayment we hereby pledge to the said Ætna Insurance Company the said recovery and deliver to them duly endorsed the Bills of Lading for said property, and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Ætna Insurance Company

$9723.68.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

Description of property:
33000 bags sugar
3/32 interest

322 Ætna Insurance Company.

Policy No. 20251.

Dated Dec. 29, 1911.

"Czarnikow-Rionda Company, on account of whom it may concern In case of loss, to be paid to them or order. Do make insurance and cause them to be insured lost or not lost at and from—

To cover one eighth interest in all shipments, their own or consigned to them or to bankers or to others for their account or in which they may have an interest, also covering merchandise sold by Mess. Czarnikow-Rionda Co. for account of others and consigned to them or to bankers or others except only such shipments as they may be instructed not to insure. Merchandise sold 'Cost and Freight' not to be covered under this policy.

On Merchandise, Specie, Bullion & Currency including advance freight if any."

* * * * * * *

"Per steamer or steamers sailing after

To be insured, lost or not lost, at and from port or ports in Cuba, Porto Rico and West Indies generally."

* * * * * * *

"And it is warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

Memorandum attached dated Jan'y 27, 1912:

"It is hereby understood and agreed that this policy covers a three-thirty-seconds (3/32) interest instead of as heretofore.

All other terms and conditions remaining unchanged."

323 LIBELANT'S EXHIBIT 7.

(Duplicate.)

Borrowed and Received of the St. Paul Fire & Marine Insurance Company the sum of Eighteen thousand five hundred and eighty three Dollars ($18,583.30) as a loan and not as a payment of any claim which I/we may have against said Insurance Company.

This amount is loaned to me/us and is to be returned by me/us to the

St. Paul Fire & Marine Insurance Company

when, and to the same extent which I/we recover from any other person or corporation the value of

Sugar

Shipped per Str. "Julia Luckenbach" slg. about May 1, 1912 from Porto Rico to Philadelphia

In consideration of said Loan I/we hereby agree to use my/our best endeavors to recover the value of the sugar mentioned above, from any and all persons and corporations who may be liable therefor, and that I/we will institute and prosecute any and all suits and proceedings in my/our name for that purpose, as I/we may be requested by the Underwriters on the cargo, but at their expense and not mine/ours.

Dated, July 23rd 1912.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

Borrowed and Received of the St. Paul Fire & Marine Insurance Company the sum of Eight hundred sixty-four and 06/100 —— Dollars, ($864.06) as a loan and not as a payment of any claim which I/we may have against said Insurance Company.

324 This amount is loaned to me/us and is to be returned by me/us to the

St. Paul Fire & Marine Insurance Company

when, and to the same extent which I/we recover from any other person or corporation the value of Sugars

| | | |
|---|---|---|
| #1 Hatch | 547 bags | $3065.92 |
| #2 Hatch | 437 " | 2348.53 |

Shipped per Str. Julia Luckenbach Slg. May 1, 1912 from Porto Rico to Philadelphia

In consideration of said Loan I/we hereby agree to use my/our best endeavors to recover the value of the sugar mentioned above,

from any and all persons and corporations who may be liable therefor, and that I/we will institute and prosecute any and all suits and proceedings in my/our name for that purpose, as I/we may be requested by the Underwriters on the cargo, but at their expense and not mine/ours.

Dated, Phila. Aug. 26/12.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

St. Paul Fire & Marine Ins. Co.

Policy #22,305.

Dated Jan'y 23, 1912.

"Czarnikow-Rionda Company on account of whom it may concern. In case of loss to be paid in funds current in the United States to them or order. Do make Insurance and cause to
325 be insured, lost or not lost.

To cover one fourth (¼th) interest in all shipments of Merchandise, Specie, Bullion and Currency, including advanced freight, if any, their own or consigned to them or to bankers or to others for their account or in which they may have an interest, also covering merchandise sold by the assured for account of others and consigned to them or to bankers or others except only such shipments as they may be instructed not to insure, also excluding shipments sold 'Cost and Freight'

Per Steamer or Steamers and connecting conveyances sailing on and after January 1, 1912, at and from port or ports in Cuba, Porto Rico and West Indies generally &c &c.

* * * * * * *

"It is also agreed that if any goods, etc. lost or damaged be shipped under an Insured bill of lading, or if the rate of freight thereon includes insurance, or in case any agreement be made or accepted by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which any carrier or bailee (or their underwriter) may be liable, the benefit of any insurance effected by the assured, then and in that event this policy shall be void as regards any liability for such loss hereunder, but this Company in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot (and could not in the absence of this insurance) be collected from carriers and/or bailees of property lost or damaged, and/or their insurers, and also shall be chargeable with the direct pecuniary loss to the assured temporarily arising from delay in collection from said carriers and/or bailees and/or insurers; and the advancing (for the purpose
326 only of avoiding such pecuniary loss) of funds to the assured for his protection pending such delay, shall in no case

be considered as affecting the question of the final liability of this Company, and as soon as collection is made from carriers and/or bailees and/or insurers, the assured shall retain only such proportion of the sum or sums so advanced by this Company as will, with the amount collected from carriers and/or bailees and/or insurers, make up the sum of the assured's loss, and the balance of the sum or sums as may have been advanced by this Company shall thereupon be paid back to this Company; but if no such collection can be made from carriers and/or bailees and/or insurers, the assured shall retain so much of said sum or sums which may have been advanced by this Company as shall not exceed the actual liability of this Company thereby established (provided always the loss shall constitute in other respects a claim under this insurance)."

Memorandum attached dated January 27, 1912:

"As to all shipments made on and after this date:

It is agreed that this policy subject to all its terms and conditions is hereby made to cover three sixteenths (3/16ths) interest instead of one fourth (¼th) interest as heretofore.

Otherwise this policy remains unchanged."

327 LIBELANT'S EXHIBIT 8.

Received from The Thames and Mersey Marine Insurance Company, Limited, Twelve Thousand Three Hundred Eighty Eight. 87/100 Dollars, being a loan without interest pending investigation of claim arising from loss of and/or damage to Sugar per "Julia Luckenbach" (S) to be repaid only from any recovery that may be made from third parties against whom suit is hereby authorized to be brought in our name at expense of The Thames and Mersey Marine Insurance Company, Limited.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

July 15/12
$12,388.87

Received from The Thames and Mersey Marine Insurance Company, Limited Five hundred and seventy six 4/100 Dollars, being a loan without interest pending investigation of claim arising from Particular Average and Partial Loss of Sugar ex "Julia Luckenbach" (s), April, 1912, to be repaid only from any recovery that may be made from third parties against whom suit is hereby authorized to be brought in our name at expense of The Thames & Mersey Marine Insurance Company, Limited.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. POMEROY, *Treasurer.*

Aug. 22/12
$576.04

328 Thames & Mersey Marine Ins. Co., Ltd.

Policy #1580C. Dated Sept. 1, 1909.

"Czarnikow-Rionda Company. On account of whom it may concern. In case of loss to be paid to them or order.

Do make insurance and cause themselves to be insured, lost or not lost at and from

As per form attached."

*Form Attached.*

"At and from port or ports in Cuba, Porto Rico and West Indies generally" * * *

"On Merchandise, Specie Bullion and Currency including advanced freight if any

To cover one fifth interest in all shipments their own or consigned to them or to bankers or to others for their account or in which they may have an interest, also covering merchandise sold by Czarnikow-Rionda Company, for account of others and consigned to them or to bankers or others except only such shipments as they may be instructed not to insure.

Merchandise sold 'Cost and Freight' not to be covered under this policy." * * *

"To attach and cover as above on all shipments made on or after this date."

* * * * * * *

"Warranted by the Assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for loss or damage thereto; and free from any liability for merchandise shipped under a Bill of Lading containing a stipulation that the carrier shall have the benefit of any insurance thereon."

"Memorandum attached, dated May 19, 1910:

"It is hereby understood and agreed that in respect of shipments by vessels sailing on and after May 10, 1910, this policy attaches on one eighth (⅛) interest only.

In lieu of as within stated."

329 LIBELANT'S EXHIBIT 9.

To Mannheim Insurance Company.

DEAR SIRS: In consideration of your advancing us the sum of Ninety-two hundred and ninety-one and 45/100 Dollars—$9,291.45 as a loan to be repaid as recovery may be effected from the carriers in respect of the undernoted merchandise, we hereby agree to put forward a claim against the Carriers and/or Bailees of the said merchandise in whose hands the same received damage and upon receiving payment from them we hereby undertake to refund you whatever is recovered.

It is further understood and agreed that you are to be responsible for all Costs, Attorney's fees and expenses incurred in connection with the claim.

Yours faithfully,

THE W. J. McCAHAN SUGAR REFINING CO.
R. S. POMEROY, *Treasurer.*

8/26/12.

Description of Goods referred to above.

28,265

301,500. Interest in full cargo sugar arrived at Philadelphia, May 16/'12 from Porto Rico. On account.

330 To Mannheim Insurance Company.

DEAR SIRS: In consideration of your advancing us the sum of Four hundred and thirty-two and 03/100 Dollars—$432.03—as a loan to be repaid as recovery may be effected from the carriers in respect of the undernoted merchandise, we hereby agree to put forward a claim against the Carriers and/or Bailees of the said merchandise in whose hands the same received damage and upon receiving payment from them we hereby undertake to refund you whatever is recovered.

It is further understood and agreed that you are to be responsible for all Costs, Attorney's fees and expenses incurred in connection with the claim.

Yours faithfully.

THE W. J. McCAHAN SUGAR REFINING CO.
R. S. POMEROY. *Treasurer.*

8/26/12.

Description of Goods referred to above.

28,265

301,500. Interest in full cargo sugar arrived at Philadelphia, May 16/'12 from Porto Rico. Final payment.

Stamped across face: "Duplicate."

331 Mannheim Insurance Company.

Policy No. 3762.

Dated Sept. 24, 1909.

"Czarnikow-Rionda Company. For account of whom it may concern. Loss if any payable to them or order.

To cover 1/5th interest in all shipments, their own or consigned to them or to bankers or to others for their account or in which

they may have an interest, also covering merchandise sold by Mess. Czarnikow-Rionda Co. for account of others and consigned to them or to bankers or others except only such shipments as they may be instructed not to insure.

Merchandise sold 'Cost and Freight' not to be covered under this policy.

On Merchandise, Specie, Bullion and Currency, including advanced freight if any."

* * * * * * *

"Per Steamer or Steamers sailing on and after September 1st 1909.

To be insured, lost or not lost, at and from port or ports in Cuba, Porto Rico and West Indies generally." * * *

"This insurance warranted to be in all cases null and void to the extent of any insurance by any carrier or bailee which would attach and cover said property if this policy had not been issued, and to be null and void as concerns loss or damage on land to the extent of any insurance against loss or damage by fire directly or indirectly covering upon the same property, whether prior or subsequent hereto in date.

And it is also understood and agreed that in case any agreement be made or accepted by the assured with any carrier or bailee, by which it is stipulated that such or any carrier or bailee shall
332 have, in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurers shall be discharged from any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailees and/or insurers of property lost or damaged, but also shall be chargeable with the direct pecuniary consequence to the assured temporarily arising from delay in collecting from said carrier and/or bailees and/or insurers, and the advancing for this purpose only of funds to the assured for his protection pending such delay shall in no case be considered as affecting the question of the final liability of this insurance, and as soon as collection is made from the carrier and/or bailees and/or insurers, shall be repaid to the insurer, but in case of final failure to collect from the carrier and/or bailees and/or insurers, a portion of the sums advanced by the insurers, equal to the sum short collected from the carrier and/or bailee and/or insurers may be retained and applied in settlement of the actual liability of this insurance thereby established (provided always the loss shall constitute in other respects a claim under this insurance)."

Memorandum attached dated Feb'y 8, 1912.

"It is hereby understood and agreed that this policy subject to all its terms and conditions is hereby made to cover three-thirty-seconds (3/32) interest instead of one/eighth (⅛) interest as heretofore.

This agreement to take effect as regards all shipments made on and after January 27th, 1912.

All other terms and conditions remaining unchanged."

333 LIBELANT'S EXHIBIT 10.

Drawing by Jobson.

(This exhibit will be found facing page 79.)

LIBELANT'S EXHIBIT 12.

(Duplicate.)

Insular Line P.

Wm. E. Peck & Co., General Agents.
116 Broad Street, New York.

NOTICE.—This Bill of Lading constitutes the contract, between the shipper or Other Agent or the Owner of the Property carried, and the Insular Line.

Received from Giorgetti-Cintron-Aboy & Co. in apparent good order and condition for shipment by the Steamship "Julia Luckenbach" at Arecibo, P. R., and bound for Philadelphia or as near thereto as the vessel may safely get, having liberty to call, enter or stay at any other ports or places, once or oftener, backward or forward, in any order or rotation, whether in or out of the customary or advertised route, for any purposes, and the same to be deemed within the intended voyage, and not a deviation; and with liberty to substitute (or transship the goods by) any other or succeeding Steamer, the following packages, said to contain merchandise as hereinafter specified, and subject to all conditions as stated
334 hereon, being marked and numbered as below, Shipper's weight (quality, contents, weight, condition and value unknown), and to be delivered in like order and condition unto Wm. J. McCahan Sugar Refining Company or his or their assigns, he or they paying freight and charges as per margin and average accustomed, if any.

It is hereby expressly agreed that Freight prepaid is not to be returned ship or goods lost or not lost, and on the happening of any of the contingencies hereinafter mentioned, the carrier is to have right to forward the goods to the Port of Destination on its own or any other route, and shall receive extra compensation for such service, whether performed by vessels of this line, or those of strangers, and in case of salvage services rendered to said goods during the voyage by a vessel of the said line, such salvage services shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

Marks—"Cambalache"; Bags—9,000 Nine thousand bags centrifugal sugar; Gross Weight, 2,250,000 lbs.; Value—$109,000.00.
25 bags wet by salt water.
44 bags slightly wet by salt water.
1 bag broken.

It is understood that the first refinery at which the steamer calls, the quantity called for by B/L is to be delivered regardless of marks.

It is mutually agreed that the steamer shall have liberty to sail with or without pilots; to tow and assist vessels in all situations; to deviate for the purpose of saving life and property; and, in case the ship shall put into a port of refuge or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other Steamship.

335 It is also mutually agreed that the carrier shall not be liable as carrier or bailee, for loss or damage occasioned by causes beyond its control, whether of like nature to those herein specifically excepted or not; by the perils of the sea or other waters; by fire or explosion from any cause wheresoever occurring; by barratry of the Master or crew; by enemies, pirates, robbers or thieves; by arrest or restraint of princes, rulers or people; by legal process or stoppage in transitu; by riots, strikes or stoppage of labor; by fumigation or other treatment required by quarantine or sanitary authorities; by explosion, bursting of boilers, damage from steam, breakage of shafts, accidents to or from machinery of any steamer, or breakage or derangement thereof, or any latent defect in hull, machinery or appurtenances, or by unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager; by collision, stranding, or other dangers or accidents of steam navigation of whatever kind; by heat, frost, effects of climate, decay, putrefaction, rust, sweat, rain, floods, freshets, change of character, contact with or smell, evaporation or taint from other goods, drainage, leakage, breakage or damage; nor for any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for loss or damage caused by the prolongation of the voyage.

It is mutually agreed that General Average shall be payable according to York-Antwerp Rules, 1890, and as to matters not therein provided for, according to usages of the Port of New York.

336 If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent or other defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defect or the unseaworthiness was not discoverable by the exercise of due diligence), the consignees or owners of the cargo shall, nevertheless,

pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the ship owner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation or in the management of the vessel, or any latent or other defect or unseaworthiness.

And the rate of freight having been adjusted upon the basis of the agreements above and hereinafter set forth, it is further mutually agreed as follows:

1. That full freight shall be payable on damaged or unsound goods; that if weight or quantity delivered exceeds weight or quantity on which freight may have been computed, the carrier may collect freight on such excess; and that shipper, owner, or consignee, all or any of them, shall be liable for all freight, and other charges provided for in this bill of lading, or in connection with the loading, transportation, custody, handling, sorting or disposition of the goods, and the carrier shall have a lien on the goods therefor, which shall continue after delivery of the goods until paid, and being unpaid shall entitle the carrier to retake possession of the goods.

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2. That shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive, noxious or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent, or aware of the nature of the goods or not; and that such goods may be thrown overboard or destroyed at any time, without compensation.

3. That explosive, dangerous or noxious articles may be carried on deck, and that such articles, as well as articles whose bulk requires them to be carried on deck, shall be at the risk of the shipper, owner or consignee thereof of all loss or damage occurring thereto while so carried.

4. That the carrier shall have a lien on the goods for all freights, primages and charges; and also for all charges, expenses, fines, liability or damages which carrier, ship or cargo, may incur or suffer by reason of any illegal, incorrect or insufficient marking, numbering or addressing of packages or description of contents, or for any illegal or improper act of shipper, owner or consignee, and also for all other sums for which shipper, owner or consignee may be liable hereunder to carrier.

5. That the steamer may commence discharging immediately upon arrival, and discharge continuously, the goods to be taken from the ship's tackle where the carrier's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, the agent or master of the steamer to have the option of hiring lighters or craft at port of discharge for the landing of the goods at the expense and risk of the shipper, owner or consignee, all or any of them; and if the goods be not taken from the ship by the consignee directly they come to

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hand in discharging the steamer, all responsibility of ship or carrier therefor shall thereupon be ended, and the agent or master of the steamer shall have liberty, at the sole risk, charge and expense of shipper, owner and consignee, all or any of them, to enter and land the goods, put them in hulk, craft or store, deposit them in warehouse, or upon the Company's, or other wharf, or in public store, or permit them to lie where landed as the authorities of the port shall direct, or as may be customary, whereupon the goods shall be deemed to be delivered, the ship and carrier retaining a lien on the goods until the payment of all costs and charges incurred, and the goods to be subject to storage, wharfage and other charges. If by reason of the want or impossibility of obtaining lighters, or other conditions not due to the carrier's fault, in the Master's opinion the steamer is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods, or if the goods cannot be found, the steamer shall be at liberty to proceed on the voyage with the whole or any portion of the within goods remaining on board, and to deliver them on the return trip or to forward them to destination from the first convenient port at which the steamer may subsequently call at the risk and expense of the consignee, and the Company shall not be responsible for damage or loss in consequence thereof. It is further stipulated and agreed that if the
339 steamer discharge at wharf, consignee is to receive the goods at such wharf, and that if the Company shall have delivered the goods to any other carrier to be transported to their destination, the Company's liability shall cease altogether upon such delivery.

6. That if the ship is prevented by quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner or consignee, discharged into depots, lazarettes, hulks, crafts, or lighters at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the carrier therefor, as carrier, bailee, or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or thereafter incurred, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the carrier retaining a lien on the goods therefor; but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the Master's opinion, the carrier may forthwith without previous notice proceed to the nearest safe port, or at ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and the carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased cost of delivery.

340 7. That unless a higher value be stated herein, the value of the goods hereby receipted for does not exceed $100 per pack-

age, nor $8 per cubic foot, and that the rate of freight has been adjusted on such valuation; and that in computing the amount of any liability of the carrier, as carrier, bailee, or otherwise, with respect to said goods, no higher value shall be placed upon said goods than the invoice cost not exceeding $100 per package or $8 per cubic foot, or such other values as may be stated herein, and in no case shall the carrier be held liable for any profits or increase of price or value over said invoice cost, not exceeding said value, or for any consequential or special damages, and the carrier shall always have the option of replacing any lost or damaged goods.

8. That the Steamship Company shall not be liable as carrier, bailee, or otherwise for any claim or demand for short delivery of or for loss of or damage to the said goods, unless such claim or demand be presented in writing within ten days after the vessel has finished discharging, to the master or agent of the vessel at the port of discharge, nor for any other claim or demand arising thereunder or in connection with the lading, stowage, custody, transportation, disposition or delivery of said goods, unless presented in writing within thirty days after such completed discharge to carrier or agent at port of shipment or discharge; nor shall any suit, action or proceeding in law, equity or admiralty to recover on or upon any such claim or demand be maintained against carrier, ship or representative, unless commenced within six months from such completed discharge, and the lapse of such period shall be deemed a complete bar to recovery in any such suit, action or proceeding not sooner
341 commenced; and nothing shall be deemed a waiver of the provisions of this article, except a written express waiver signed by the carrier sought to be charged.

9. That the carrier shall not be liable for loss or damage to said goods caused in whole or part by causes which are insured against by or for account of the shipper, owner or consignee; and in case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the full benefit of any insurance that may have been effected upon or on account of said goods.

10. That in case the surf or state of the weather upon the arrival of the Steamer shall be such as to render it, in the Master's opinion, impracticable to land the goods at the port to which they are destined, they may be retained on board until her return trip, or may be transferred to another Steamer at the risk and expense of the owner or consignee of the goods.

11. That the shipper, owner and consignee, all and any of them, shall be liable to carrier for any loss or damage to, or duty, tax, fine, penalty, charge, expense or liability, directly or indirectly incurred or suffered by carrier, by reason of illegal, incorrect or insufficient marking or numbering of packages or goods or description of contents or weight, or any other particulars required by any government authority, or by reason of any other illegal or improper act or omission of shipper or consignee.

12. That the carriers shall not be liable for gold or other precious

metal, precious stones, bills, notes or securities, documents,
342 pictures, glass, china, silk, lace, or any of the articles enumerated in Section 4281 of the U. S. Revised Statutes, except in accordance with such Statute, and after written notice of the character and value thereof at time of loading, and entry thereof, in the bill of lading, in accordance with such statute.

13. That merchandise on wharf or in warehouse awaiting shipment, transshipment or delivery be at owner's risk of loss or damage by fire, flood, and/or the giving away or falling or destruction in whole or part of the warehouse or the wharf or any structure thereon, not happening through the fault or negligence of carrier or representative.

14. That this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled, "An Act relating to the Navigation of Vessels, etc."

15. That the goods shall be subject to charges for mending and repair of packages which shall be a lien thereon, and paid by consignee; that sweepings, if any, shall be apportioned to the different consignees, according to the shortages in delivery, and be accepted as delivery to the extent thereof.

16. And finally, that in accepting this bill of lading the shipper, owner and consignee of the goods, and holder of this bill of lading, agree to be bound by all its stipulations and conditions, whether written, printed or stamped, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the Master or Agent of said Ship hath
343 affirmed to Three Bills of Lading, all of this tenor and date, drawn as "first," "second," "third," one of which being accomplished, the others are to stand void.

Dated in Arecibo, P. R., Apr- 25 1912.

I. CLIRILLES & CO.,
*For Insular Line.*

CLAIMANT'S EXHIBIT "B" OF APRIL 5, 1915.

Insular Line, Inc.,

Calle Tetuan, San Juan, P. R., April 23, 1912.

Captain, S/S Julia Luckenbach,
San Juan, P. R.

DEAR SIR: Please dock at Quartermaster's Dock at earliest possible moment. It is our intention to work some tonight if possible, and the earlier you get alongside the better it will be.

Yours very truly,

INSULAR LINE,
A. L. EHRNMAN,
*Ass't M'g'r.*

CLAIMANT'S EXHIBIT "A."

Diagram by Smith.

This exhibit will be found facing page 97.

344 CLAIMANT'S EXHIBIT "B."

Diagram by Worke.

This exhibit will be found facing page 119.

CLAIMANT'S EXHIBIT "C."

Edgar F. Luckenbach, Ship Owner, Agent and Broker, New York City, N. Y.

*Time Charter, Government Form.*

Cable Address: "Luckenbach," New York.
Use Watkins' Code and Appendix.

This Charter Party, made and concluded upon in the City of New York, the 25th day of October, 1910, between Estate of Lewis Luckenbach, Owners, of the good American Screw Steamship "Julia Luckenbach," of New York, of 3100 tons gross register, and 1979 tons net register, classed A 1 American Record, and Insular Line, Inc., New York, N. Y., Charterers.

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said steamship from the time of delivery, for a period of three (3) years and seven (7) months, Steamer to be placed at the disposal of the Charterers, at expiration of present charter, May 31, 1911—7 A. M. (where she may always safely lie afloat, at all times of tide), and being, on her delivery, tight, staunch, strong and in every way fitted for the service, having steam winches and boiler with capacity to run all the steam winches at once and at the same time (and with full complement of officers, sea-
345 men, engineers and firemen for a vessel of her tonnage), to be employed in carrying lawful merchandise, including petroleum or its products, in cases, between ports within the following limits:

The Atlantic Coast and Gulf of Mexico, within a range from Portland, Maine, to all safe ports in the Carribean Sea, as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owner shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. Owner also to furnish blocks

and falls as customary, for handling cargo up to 3 tons (Gross) in weight, also winches.

2. That the Charterers shall provide and pay for all the Coal, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (excepting those pertaining to the captain, officers or crew), and all other Charges whatsoever, except those before stated.

Charterers are to provide necessary dunnage and shifting boards, but Owners to allow them the use of the dunnage and shifting boards already aboard Steamer.

3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall, on the expiration of this Charter Party, pay for all Coal left in the Bunkers, at the current market price at the respective Ports where she is delivered to them.

346 4. That the Charterers shall pay for the use and hire of the said Vessel Six thousand (6,000) Dollars per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at New York.

5. That should the Steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or their agents, and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owner's agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of the said hire to be made in cash, semi-monthly, in advance, or as agreed, and in default of such payment the owners shall have the faculty of withdrawing the said Steamer from the service of the Charterers without prejudice to any claim they (the owners) may otherwise have on the Charterers, in pursuance of this Charter.

7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual places of loading, and accommoda*da*tions of the Ship (not more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's
347 officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

9. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with Ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the Steamer and see that voyages are prosecuted with the utmost dispatch. He to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

14. That the Charterers shall have the right of cancelling this charter on giving notice thereof to the owners or their Agents six months previous to desired date of cancellation.

348 15.

16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damages preventing the working of the Vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the Vessel be driven into port or to anchorage by stress of weather or from any accident to cargo, such detention or loss of time shall be at the Charterers' risk and expense.

17. That should the Vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the Charterers. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accident of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and Errors of Navigation, throughout this Charter Party, always mutually excepted.

18. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned.

20. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. General average, if any, to be according to York-Antwerp Rules, 1890.

349 21. That as the Steamer may be from time to time employed in tropical waters during the term of this Charter, Steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, at least once in every six months,

and payment of the hire to be suspended until she is again in proper state for the service.

22. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterers' disposal during loading and discharging, and Charterers to provide men to work same both day and night as required, Charterers agreeing to pay all expenses.

23. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act Relating to Navigation of Vessels, etc."

24. Penalty for non-performance of this Contract, estimated amount of damages.

Damage Lifts Over 3 Tons.

25. The charterers are to be responsible for damages resulting from handling lifts of over three tons (of 2,240 pounds in weight) caused through any fault except Act of God, perils of the sea, or fault in vessel's equipment no matter whether such damage occurred through the lift being handled by the Insular Line's employees, stevedores or vessel's crew when acting for the charterers.

Damage from Deck Cargoes.

26. The charterers to be responsible for any damages that
350 may be done by deck cargoes, unless such damages are caused by Act of God, or perils of the sea, or circumstances over which Insular Line have no control.

Acids.

27. When acids are carried on deck it is mutually agreed that they shall be stowed under the supervision of Captain and in accordance with the requirements of said captain and/or the requirements of an inspector from the underwriters; and when so stowed, charterers shall not be responsible for any damages that may be done by said acids, if caused by Act of God or perils of the sea; but charterers shall be responsible for any damage that may be caused by the acids when being loaded or discharged and for damages that may be caused by any defect in the package containing the acid, both in port and at sea.

Slings and Hatch Covers.

28. It is agreed that the charterers are to furnish all slings for the handling of all cargo, and said slings are to be their property. Charterers also to furnish any planks or boards that they may require to cover over the 'tween deck hatches; but the charterers to have the use of any such planks, boards or hatch covers as are now on the steamer.

Wireless and Electrician.

29. Any wireless outfit that may be on board at present, or that may be required to be later put on board either by law or at the option of the charterers, is to be furnished at the expense of the charterers. The charterers are also to pay for all the expenses of the wireless operator, or for any electrician or repairs that may be required
351 for the wireless outfit, but the charterers are not to pay for the electrician if required for owner's convenience, or in case same may be required by law to be put on by the owners for purpose other than looking out for the wireless outfit.

Damage Steamer or Equipment.

30. It is further agreed that all damage done to the equipment of, or to the steamer, and all damage done to the property of the charterers by the crew of the steamer or employees of the owners, shall be reported at once to the master of the steamer, or to the officer in charge, and to the purser or dock superintendent of the Insular Line. These mutual representatives shall agree together as to the cause of the damage, and report in writing to their respective employers. Any damage not so reported one to the other at the time damage occurs, or as soon thereafter as it may be known, shall be for account of the owners of the property so damaged.

Dry Dock.

31. Should steamer run out of New Orleans and charterers request steamer's bottom to be cleaned and painted at a port in the Gulf of Mexico (and if the bottom is then due for painting) it is understood that charterers are to reimburse the owners for any extra cost of dry-dock and painting charged over and above New York prices, but time used in performing the work to be for steamer's account.

32. Charterers to have liberty to sublet the steamer for all or any part of the time covered by this charter.

33. No pilotage to be charged to charterers for ports endorsed on master's certificate when master has been in or out of said
352 port or ports within eighteen months. This clause, however, shall not apply to ports south of Cape Hatteras. It also shall not apply to Philadelphia and/or Boston when steamer is loaded. If charterers at any port instruct captain to hire local pilots then the cost of such local pilotage is to be borne by the charterer.

INSULAR LINE, INC.,
Per JOS. D. PHILLIPS.
ESTATE OF LEWIS LUCKENBACH,
Per EDGAR F. LUCKENBACH, *Trustee.*

Certified to be a true copy of the Charter Party in my possession.

EDGAR F. LUCKENBACH,
Per C. H. POTTER.

CLAIMANT'S EXHIBIT "DA."

Diagram by Worke and Martin.

This exhibit will be found facing page 312.

INSULAR LINE EXHIBIT 1 OF MARCH 29, 1913.

Diagram by Knudson.

This exhibit will be found facing page 177.

353 INSULAR LINE EXHIBIT F.

Cable Address, Luckenbach, New York.
Telephone—Day Call, 632 and 633 Broad. Night Call 1946 South.

Edgar F. Luckenbach.

Transportation, Coast Towing and Wrecking, 8 Bridge Street.

Norfolk Office, 302 Marshall Ave., Norfolk, Va.

NEW YORK, Apr. 13, 1912.

Insular Line, Inc., 116 Broad Street, New York City, N. Y.

DEAR SIRS: Your letter of the 10th inst. received and in reply we respectfully refer to you our letter to you dated January 27th, 1912. Captain D. E. Rodick, Master of the "Julia Luckenbach," has been instructed to load the steamer to a draft which he thinks is safe and if you or your agents at Porto Rico are not satisfied the master is to call a survey to determine as to whether or not steamer can take more cargo or has sufficient cargo to proceed to sea. Also whether the ship is seaworthy or unseaworthy.

Yours truly,

EDGAR F. LUCKENBACH,
Per C. H. POTTER.

C. H. P./F. A. D.

354 *Opinion.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company
vs.
SS. Julia Luckenbach and Insular Line.

Opinion.

Final hearing in Admiralty; libel for loss of cargo.

The owners of sugar laden on the Julia Luckenbach, brought action in rem against the vessel, and in personam against charterers for the loss in question. Charterers appeared, the Luckenbach was claimed, and stipulation given in $60,000, which for the purpose of this case is her agreed value. Subsequently libelant's damages were raised by amendment to $87,000, whereupon the charterers petitioned in the Luckenbach's owners, in order that they might respond for so much of the recoverable loss as exceeds the agreed value of the steamer. The issues presented are therefore (1st) whether the libelant can recover at all, and (2nd) whether the ship and owners, or charterers, or both, are responsible for recoverable damages.

Lawrence Kneeland, Esq., for Libelant.

Peter S. Carter, Esq., and Charles C. Burlingham, Esq., for Claimants and Owners of the Luckenbach.

J. Parker Kirlin, Esq., for Insular Line, Charterers.

355 Hough, *D. J.*:

For some years prior to April, 1912, the Julia Luckenbach, an iron steamer then about thirty years old, had carried sugar (during the season) between Porto Rico and Atlantic ports. In the month named she was under charter to the Insular Line and on and before April 25th had laden a partial cargo of sugar in San Juan harbor. At 2 A. M. of April 26th she left her pier and at 7 A. M. arrived at Arecibo, where she completed cargo by taking on additional sugar. At 8.30 P. M. of April 27th she left Arecibo (where she had lain offshore loading from lighters) and proceeded on her voyage to Philadelphia. She encountered strong winds and rough seas, so that the vessel rolled and pitched a good deal and shipped water in and over decks. She encountered that degree of strain to be expected in frequent Atlantic weather, and no more. It is not asserted that any injury received is due to peril of the sea,—in the legal sense of that phrase.

At 7.40 P. M. on April 28th, i. e., after about twenty-four hours of rough weather, she was found to have seven feet of water in her after hold, and was thereafter with great difficulty kept afloat (the after hold being of unusual size), until refuge was found in San Juan harbor. A hole was then discovered in a plate on her starboard

side (strake B), very nearly, if not accurately 1¾ by ⅞ of an inch. At the edges of the hole the original half-inch of iron had worn to a knife edge; the plate in the immediate neighborhood was much decayed.

Temporary repairs were made, which naturally removed all cement from the vicinity of the hole. It is clear from the testimony of the vessel's officers that when examined in San Juan the cement backing was gone; but there is naturally no direct evidence as to the condition of said cement at and just prior to the breaking away of the iron plate.

356 There is satisfactory testimony that the outside paint showed no signs of scratching or abrasion in the vicinity of the hole; and that the hole itself was from fifteen to eighteen inches above the keel. This disposes of one issue raised in the pleading, i. e., that the Luckenbach lay aground at San Juan and was punctured or weakened by so doing. I think it is quite plain that the Luckenbach was in the mud in San Juan harbor; how much mud it is impossible to say with certainty, but it was soft, vessels go in it a foot or more without requiring tugs to get them out, the Luckenbach was certainly not in that much, and even more certainly was never in deep enough to put the spot where the hole was found, upon the ground—if soft mud is ground.

The immediate cause of flooding the hold and consequent destruction of sugar was the sudden breaking of the impaired plate. Such impairment of plate had evidently existed long before the beginning of the voyage, whether said voyage is held to begin at San Juan or the last port of departure from the United States. No vessel with such a thin plate is seaworthy; consequently the Luckenbach was not seaworthy, and she and her owners are responsible for the loss due to such breach of warranty unless they exercised due diligence. This is the measure of their obligation, both under the bill of lading and the Harter Act.

Messrs. Martin and Work (both witnesses for the Luckenbach) have put in the record a satisfactory diagram showing the position of this hole. It was in a peculiarly difficult place to observe. Admittedly the plate or its cement could not be studied thoroughly without taking up the permanent ceiling, though the region could be seen by removing boards loose for that purpose, and inserting a light behind the permanent boards of the ceiling.

357 The Luckenbach is old, but well constructed, and no criticism is made of the quality of her materials. The reason for the decay of this good iron plate is admitted, i. e., corrosion through a mixture of salt water and sugar—a subject sufficiently dwelt upon in The Alvena, 79 Fed. Rep., 973.

One witness deposes to knowledge of a substantial iron plate having been eaten away by this compound in less than twelve months; Mr. Martin would not like to say that it could be done in so short a time as two years, but he is quite certain that it could happen inside of four years. Thus neither to lawyers nor mariners is there anything novel in the danger to iron ships in the sugar trade, and the Luckenbach had long been engaged therein.

Due diligence must always be proportioned to the amount of danger reasonably anticipated, so it is evident that owners of this ship were bound to exercise special care to guard against the special danger that has produced this great loss.

The corrosive mixture of water and sugar must be in contact with metal in order to work damage; the cement backing is to prevent such contact. Evidently the Luckenbach's cement had either long been broken, or had not been tight against the plate—in the latter case forming a sort of pocket where fluid would rest with peculiarly destructive results.

If the cement was broken probably a thorough search with lights would have revealed it—but if it was loose nothing but taking up the ceiling and tapping the cement would reveal the hollow space.

That the whole ceiling had not been up for three years is, I think, fairly shown—that it had not been possible to examine otherwise than by lowered lights for over one year is, if not plainly proven, admitted.

This in my opinion was not due diligence, and I say
358 this recognizing that the Luckenbach's defect was even more difficult to discover than that so thoroughly discussed by Brown, D. J., in The Alvena, 74 Fed. Rep., at 254-255.

The above findings would dispose of the case, were it not for the claimants' and respondent's contention that for much, if not all, the damage they are entitled to the benefit of shipper's insurance.

The lost sugar was shipped under bills of lading containing the familiar clause:

"In case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the full benefit of any insurance that may have been effected upon or on account of said goods."

Insurance was effected on said goods, with five separate companies, whose countervailing weapons in the long fight between shipper and carrier (or rather, their underwriters) were not identical.

Some policies contained the words:

"Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."*

359 Others provided:

"In case any agreement be made or accepted by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which any carrier or bailee (or their underwriters) may be liable the benefit of any in-

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Note * :
Federal Ins. Co. (½ risk).
Thames & Mersey Co. (⅛ risk).
Aetna Ins. Co. (3-32 risk).

suance effected by the assured, then and in that event this policy shall be void as regards any liability for such loss hereunder."*

Down to this point the two forms are alike in effect. All the policies antedated the shipment, and were (pro tanto) voided by the issuance and acceptance of the bill of lading.

The policies last referred to continue as follows:

"but this Company in these and all cases of loss or damage by peril insured against shall be liable and owe actual payment for (only) what cannot (and could not in the absence of this insurance) be collected from carriers and/or bailees of property lost or damaged, and shall also be chargeable with the direct pecuniary loss to the assured temporarily arising from delay in collecting from said carriers and/or bailees; and the advancing (for the purpose of avoiding only of such pecuniary loss) of funds to the assured for his protection pending such delay, shall in no case be considered as affecting the question of the final liability of this Company, but as soon as collection is made from carriers and/or bailees, the
360 assured shall retain only such proportion of the sum or sums so advanced by this Company as well with the amount collected from carriers and/or bailees, make up the sum of the assured's loss, and the balance of the sum of sums as may have been advanced by this Company shall thereupon be paid back to this Company; but no such collection can be made from carriers and/or bailees, the assured shall retain so much of said sum or sums so advanced by this Company as shall not exceed the actual liability of this Company thereby established (provided always the loss shall constitute in other respects a claim under this insurance)."

These clauses amount to a contract by insurers to advance sufficient funds to the insured to protect him from the pecuniary loss temporarily arising from delay in collecting from carriers, and to an agreement to pay the difference between actual loss and recovery from carriers, not exceeding the amount of the insurance nullified by the earlier words of the policy.

When libelants lost their sugar, this libel was filed by counsel for the underwriters, and a few days later receipts were signed by libelants evidencing large payment† to them by their several insurers.

The form of these receipts varies slightly; the variances are of no importance, and the material points may be shown by the receipt taken by the St. Paul Fire & Marine Company, which is one of the underwriters covenanting to advance money.

361 This receipt reads:

"Borrowed and received of the (insurer), $18,583.30 as a loan and not as a payment of any claim which we may have against said Insurance Company.

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Note * :

St. Paul F. & M. Co., (3-16 risk).

Manheim Ins. Co., (3-32 risk).

†How large cannot be fixed, as all the receipts have not been filed. Apparently more was "advanced" than is sued for.

This amount is loaned to us and is to be returned by us to the (insurer) when and to the same extent which we recover from any other person or corporation the value of (the lost sugar).

In consideration of said loan we hereby agree to use our best endeavors to recover the value of the sugar from all persons or corporations who may be liable therefor, and that we will institute and prosecute all suits in our name for that purpose, as we may be requested by the (insurers) but at their expense and not ours."

It is signed by libelant.

As a compliance with the terms of its own policy, this receipt is a curiosity. But whether or not bound to do anything by their policies' terms, the receipts all show payments called loans, which the lenders are to get back as best they can by suing somebody at their own expense, but in the name of the insured.

Sometimes the claim in suit, or the bills of lading for the lost merchandise, are specifically pledged for "repayment" of this "loan" *—but all the receipts would leave the uninitiated in the belief that the "loan" had no other origin than a desire to buy a lawsuit.

The foregoing lengthy statement can be justified only by a desire that this case be taken further, and some settlement reached in a matter wherein the fictions and subterfuges of the law would excite the admiration of a casual ejector.

362 It is not necessary to go beyond this circuit for instances: the decisions in Pennsylvania Railroad vs. Manheim Ins. Co., 56 Fed. Rep., 301; Pennsylvania Railroad vs. Burr, 130 Fed. Rep., 847, and Bradley vs. Lehigh Valley Railroad, 153 Fed. Rep., 350, give a very fair picture of the sort of thing which has rendered the decision in Phœnix Insurance Co. vs. Erie & Western Tr. Co., 117 U. S., 312, only useful among fools.

What was done in this case, the course of business pursued, the anticipated, agreed upon and paid for insurance schemes, differs from that pursued, investigated and approved in the Burr and Bradley cases, in no material particular,—the sole difference in the record is that these carriers have produced in Court the man behind the apparatus of papers,—and Mr. Ogden has naturally told the truth.

This record contains proof that when a shipper gets insurance he (or his broker) knows that by the policy he pays for, he is left (pro tanto) without insurance whenever he accepts a bill of lading requiring him to give the carrier the benefit of his contract, but he is contemporaneously assured that by a gentleman's agreement, paid for by his premiums, he will receive against usual proofs of loss, the amount he would have gotten had there been no bill of lading, that he will never be called on to pay back any of the money, and that as far as he is concerned his insurance protection is as absolute as though one clause in the policy did not exist because he is assured beforehand that in consideration of his premium that solemn warranty will not be practically enforced.

To say that a man in this condition is not insured, is nonsense,—any insurance company that refused to make the so-called "loan"

* Federal Ins. Co.; Aetna Ins. Co.

could be successfully sued,—the complaint sounding in fraud and deceit.

363 Indeed recourse need not be had to a pleading in tort,—for the real contract is not expressed in policy and riders. The actual and enforceable agreement is to pay the loss, provided it be always called a "loan."

To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient is a "loan,"—insults understanding.

Unless shams are loved for themselves, they must be encouraged for a reason. Such reason exists here, there has always been a settled hostility to the Erie & Western case among the lower Courts.

Nor do I suppose that all the shams above described were not patent to Wallace, J., when he wrote in the Bradley case. It never needed Mr. Ogden's admissions to enable that Judge to see what he wished to perceive behind the machinery of misbranded papers. There has never been any desire to pierce through pretence to truth, and that which defeated the carrier's defense has been almost uniformly viewed with approval.

But Wallace, J., saw that the time must come when the truth would come before some Court, and how far he was prepared to go is shown in 153 Fed. Rep., p. 353:

"It is not important that the (insured) may not have expressly consented to receive the payment as one not made by the insurance company in recognition of its liability. It suffices if the insurance company did not intend to recognize its liability."

And again:

"The parties were at liberty to agree that the payment * * * should be regarded as a loan or as a gratuity."

364 Even on the papers the learned Court found the word "loan" a little difficult,—gratuity certainly goes far enough. Of course the assured will agree to any form of papers which gets him his money quickest, so that it has been solemnly held in this circuit that whatever the payment is called, whatever label is put on it, controls,—at least sufficiently to close the mouth of the carrier tort-feasor.

Mr. Ogden assuredly put on the labels, he has doubtless read the cases, and what his companies can never recover is consistently called a "loan"—and at present this seems enough to make it a loan for legal purposes.

The damages and costs are recoverable against ship-owners and charterers,—the latter, however, only if execution fails against ship and owners.

Jan. 22, 1914.

365 *Interlocutory Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the Court Rooms Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 7th Day of February, 1914.

Present: Hon. Charles M. Hough, United States District Judge.

W. J. McCahan Sugar Refining Company, Libelant,
versus
The Steamship Julia Luckenbach, Her Engines, &c.; Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Claimant; the Insular Line, Respondent, and Edgar F. Luckenbach et al., Impleaded, Respondents.

This cause having been heard on the pleadings and proofs adduced by the respective parties and having been argued by their respective proctors, and due deliberation having been had, on motion of Kneeland, Harison & Hewitt, proctors for the libelant, it is

Ordered, adjudged and decreed, that the libelant recover
366 from the claimant of the steamship Julia Luckenbach and from the respondents, Edgar F. Luckenbach, et al., her owners, and from the respondent, Insular Line, the amount of the damages sustained by it by reason of the matters alleged in the libel, with interest and costs; that libelant recover its said damages in the first instance, from the claimant and the respondents, Edgar F. Luckenbach, et al., owners of said steamship; that any balance remaining uncollected after execution returned (or its equivalent) from the claimant and respondents, Edgar F. Luckenbach, et al., owners of said steamship, be recovered by libelant from the respondent, Insular Line; and the respondent, Insular Line, recover such amount as it shall pay the libelant from the respondents, Edgar F. Luckenbach, et al., owners of the steamship Julia Luckenbach.

It is further ordered, that it be referred to Herbert Green, Esq., Commissioner, to ascertain and compute the amount of the libelant's said damages and to report the same to this Court with all convenient speed.

C. M. HOUGH, *D. J.*

367 *Deposition of Edgar F. Luckenbach.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,
against
The Steamship Julia Luckenbach, Her Engines, etc.; The Insular Line, Inc., and Edgar F. Luckenbach et al.

Deposition of the witness, Edgar F. Luckenbach, taken on behalf of the claimants and owners of the steamship Julia Luckenbach, before Ross H. Whittemore, Esq., Notary Public, at his office, 15 Whitehall Street, New York City, on the 11th day of May, 1914.

Deposition of the witness taken under notice for the 28th day of April, 1914, and adjourned by consent of the proctors for the respective parties to the 11th day of May, 1914.

Appearances:

Peter S. Carter and Charles C. Burlingham, Esqs. (by Mr. Carter), Proctors for the Claimants and Owners of the Steamship Julia Luckenbach.

Kneeland, Harison & Hewitt, Esqs. (by Mr. Kneeland), Proctors for the Libelant.

Convers & Kirlin, Esqs. (by Mr. Kirlin), Proctors for The Insular Line.

Deposition of the witness taken under the usual stipulation.

368 Edgar F. Luckenbach, recalled as a witness on behalf of the claimants and owners of the steamship Julia Luckenbach, testifies as follows:

Direct examination by Mr. Carter:

Q. Mr. Luckenbach, you testified in this case on the trial in open Court, before Judge Hough, did you not?

A. Yes.

Q. In the month of December, 1913?

A. I did.

Q. Were you sworn at that time?

A. Yes.

Q. Had you, Mr. Luckenbach, any privity or knowledge, before or at the time the steamship Julia Luckenbach left New York in April, 1912, on the voyage to the different ports in Porto Rico, and while loading at San Juan and Aricebo, that this plate was rusted and thin and liable to leak or to have a hole made in it?

Mr. Kneeland: Question objected to as to privity.

Mr. Kirlin: Question objected to as calling for a conclusion, and incompetent.

A. I had not.

Mr. Carter: I submit on the part of the claimants and owners of the steamship, on the question of the right to limit the liability, the testimony of the following witnesses taken on behalf of the claimants and owners of the steamship in Court:

Carl Agro, William J. Connell, George B. Drake, Edgar F. Luckenbach, Frank S. Martin, William B. Smith and Fred L. Worke.

Cross-examination by Kneeland:

Q. Mr. Luckenbach, you testified at the hearing of this
369 case that you valued the Luckenbach at $60,000?

A. Yes, sir.

Q. How did you reach that value? On what did you base it?

A. On the valuation for barge purposes only. She wasn't of much more value than a barge.

Q. You did not consider the Luckenbach of any more value than a barge?

A. No.

Q. You place no value whatever upon her machinery?

A. No. You couldn't get the price for taking it out.

Q. Why was that? Because she was not kept in good condition?

A. No; because of antiquated compound engines.

Q. How long had you owned her?

A. About ten years.

Q. What did you pay for her?

A. I don't remember what we paid for her. She was sold at auction at Key West. You will find that on record. She was sold by the United States Marshal.

Q. Was she a prize?

A. No. She was ashore.

Q. Wrecked?

A. Yes, sir.

Q. What value did you place upon her upon your books?

A. What she cost us.

Q. And was she in poor condition when you bought her?

A. She was wrecked.

Q. And you had to repair her?

A. Yes.

Q. Now, to repair her what did she cost you?

A. She cost us about $80,000.

Q. That is, what you paid for her and the repairs you put upon her?

A. Yes.

Q. Was she insured?

Mr. Carter: Objected to as incompetent and immaterial on this question.

A. Yes.

Q. How much insurance did you have on her?

370 Mr. Carter: Objected to as incompetent and immaterial, and not within the issues now before the Court.

A. I think we had about $100,000 on her.
Q. Valued for——
A. Valued for insurance purposes only at $100,000.
Q. Had she been kept up in good shape?
A. Yes; as far as I know.
Q. Had she ever been valued for general average purposes that you know of?
A. Yes.
Q. When?
A. She was valued about a year before that.
Q. Do you know what amount she was valued at?
A. Yes.
Q. What?
A. $70,000.
Q. She was valued at $70,000?
A. Yes.
Q. You say a year before that; you mean a year before this accident occurred?
A. Yes; I think about a year before that.
Q. What was the nature of the general average accident?
A. It was a collision case.
Q. Was that the collision with the Horatius?
A. Yes.
Q. Who adjusted the average, do you know? Johnson & Higgins or Willcox, Peck & Hughes?
A. I don't remember which one had it.
Q. Do you know who valued her?
A. I think Martin did.
Q. Had she suffered any accident between that time and the carriage of this cargo?
A. Not that I remember.
Q. And the only thing that was done in this case was to put a plate outside, put a patch outside the hole in the plate?
A. I don't know what was done.
Q. By reason of this accident you didn't have to spend any money, by reason of this particular accident that caused the loss of
371 the sugar, you were not obliged to make any repairs to her, with the exception of putting a patch on the outside of the plate?
A. In the sugar case do you mean?
Q. Yes.
A. I don't know whether they put a new plate in or put a patch on.

Mr. Carter: Mr. Kneeland, does your question refer to what was done on the arrival of the steamer in Brooklyn after her discharge in Philadelphia, as to what repairs were put on her?
Mr. Kneeland: Yes.
Mr. Kirlin: I think there was evidence at the trial it was repaired, the plate.

Mr. Kneeland: No; it was overhauled, and plate taken out and fixed.

Witness: They patched it up at Porto Rico.

Cross-examination by Mr. Kirlin:

Q. The steamer was damaged in that accident with the Horatius, wasn't it?

A. Yes.

Q. The value for contributory purposes there was the damaged value, was it not?

A. Yes.

Q. Weren't repairs made after that accident?

A. Yes.

Q. How much did they cost?

A. I don't know.

Q. You can find that out? It is a matter of record, is it not?

A. Yes.

Q. In order to get the sound value at the time prior to that occurrence, if you start with $70,000, the damaged value, you would have to consider the amount of the repairs in order to reach the sound value at that time?

A. No; I don't see that.

Q. Did you collect general average on the basis of that valuation for insurance?

A. I think we did. Some of our vessels are only partly
372 insured. I don't remember how this one was insured at that time.

Q. Will you ascertain, and give to Mr. Carter, to be annexed to your deposition—if Mr. Kneeland is agreeable—the repair bill that followed that accident, and we will argue it out before the Court to see what the effect of it is?

A. All right.

Q. Now, the steamer was finally lost in a collision with the Indrakuala, was she not?

A. Yes.

Q. When was that about?

A. That was in January after this accident, this sugar damage.

Q. January, 1913?

A. Yes.

Q. And did you file a libel in that case, or was that filed by your insurers?

A. Filed by the insurers, the underwriters.

Q. Are you aware of the amount that was claimed as the value of the vessel in that suit?

A. Yes.

Q. What was it?

A. $125,000.

Q. Had they paid insurance to that amount?

A. Had they?

Q. Yes.

A. No.

Q. Did you sanction that claim?

A. I would sanction anything the lawyer wanted.

Q. Well, the interest of the insurers was the amount that they paid, wasn't it?

A. I don't know what their interest was.

Q. Was it the insurance you spoke to Mr. Kneeland of that you collected on account of her loss at the time of the collision?

A. Yes.

Q. Was that flat $100,000?

A. Yes; I think it was.

Q. Was there any insurance on disbursements?

A. That I don't know.

Q. Do you usually carry insurance on disbursements?

A. At times.

Q. Well, you can ascertain whether there was any insurance on disbursements?

A. Yes.

373 Q. Will you do that and let Mr. Carter know the amount, if there was any?

A. Yes.

Mr. Carter: Do you mean on the Julia Luckenbach, or disbursements on the sugar?

Mr. Kirlin: Insurance on disbursements on the hull of the steamship Julia Luckenbach.

By Mr. Kirlin:

Q. Was it understood between you and the underwriters that any part of the recovery of that $100,000 that had been effected was to come to the owners?

Mr. Carter: Objected to as incompetent, and not within the issues in this case.

A. No.

Q. Do you know upon what advices or valuation the claim of $125,000 was based in that proceeding?

Mr. Carter: Same objection.

A. No.

Q. Had she been carried on the books of your company at her cost price all the time since you owned her?

A. Well, we don't carry any cost price; we simply pay for a vessel and that ends it.

Q. Well, in keeping the accounts of the vessel some value, I suppose, is placed on your books, is there not?

A. Only when we purchase them, that's all.

Q. Had there been any other repairs to the vessel since the Horatius collision, prior to her loss in January, 1913, besides the repairing of the damage she had sustained in the Horatius collision?

A. I don't know that.

Q. Was she an iron or a steel vessel?

A. Iron.

374 Q. Were her policies surrendered, or do you still have them?

A. I don't know where the policies are. Usually when a loss is paid we surrender the policies.

Q. You said to Mr. Kneeland that the valuation was for insurance purposes only?

A. Yes.

Q. Do you mean to say that was the language of the policies?

A. I don't remember what the language of the policies was.

Q. The usual language of the policy is, on the hull valued at so much, and on the engines, boilers and machinery valued at so much. Have you any reason to doubt that the policies were expressed other than in the usual form?

A. No.

Q. She was later insured under policies on hull and machinery for $100,000?

A. Yes.

Q. Valued at that sum in the policies, was she not?

A. Yes.

Q. Was it against total loss only?

A. Total loss and collision.

Q. Total loss and collision; that is, damage done to another vessel?

A. Yes. Full collision I think it was, and total loss.

Q. That meant full insurance against any liability that you might be under for damage to another vessel?

A. Yes.

Q. And total loss only on the ship insured?

A. No. We have to cover our collision losses, too.

Q. Did you have her insured against partial loss for collision?

A. No; she was insured for full loss for collision. If we had an accident we got paid for our collision damage, and if we were liable the policies paid for the other man's collision damage.

Q. You had the vessel insured in some such form, I suppose, right along, had you not?

A. No.

Q. When did this policy that was on her at the time of her loss attach?

A. I don't remember that.

375 Q. Prior to that was she uninsured?

A. Some time prior to that she was uninsured.

Q. For what length of time had you carried policies of this nature upon her?

A. I don't remember.

Q. Approximately?

A. I think about a year.

Q. You had one set of policies before this set?

A. No; I think this present set was the first set we had on her for some time.

Q. Do you remember for what valuation she was insured under the last previous policies you had on her?
A. No.
Q. She was a vessel of good engine power, was she not?
A. Yes.
Q. Had speed of something like eleven knots?
A. I don't believe she would do as well as that.
Q. What was her speed?
A. I think the best she would do would be ten knots.
Q. She was the old Rotterdam Liner Zaandam, wasn't she?
A. Yes.
Q. And afterwards was the Austrian steamship Styria?
A. Yes.
Q. Ran between here and Trieste?
A. I don't know where she ran.
Q. Her engines were in such condition she was able to maintain a speed of ten knots, or approximately that, if not more, along up to the time of her loss, was she not?
A. I don't know what she was making at that time.
Q. You must have an idea what she was doing under this series of charters?
A. Not necessarily.
Q. Didn't you get abstracts of the logs at the end of the voyages?
A. Yes.
Q. And that told what speed she was making?
A. Yes.
Q. Had she any other general average cases, besides that one of the Horatius, within the last two or three years?
A. That is the only one I remember.
376 Q. Was there any general average stated on account of putting back to Porto Rico on this sugar voyage?
A. I don't know.
Q. Do you know what the ship was valued at for general average purposes at the end of that voyage on which the sugar damage happened?
A. I do not.
Q. Through what adjusters or brokers was that insurance that was on her at the time of the sugar voyage placed?
A. I think that was divided between Johnson & Higgins and Willcox, Peck & Hughes. I think they both had some.

Recross-examination by Mr. Kneeland:

Q. Mr. Luckenbach, you say you bought her about ten years ago?
A. Yes.
Q. Was the ownership the same as it is now?
A. No. Yes; at the time of the collision it was.
Q. That is, she was purchased by the estate of Lewis Luckenbach——
A. No; Lewis Luckenbach was alive then.
Q. Mr. Lewis Luckenbach was alive at the time of the purchase?
A. Yes.

Q. Now, the ownership at this time was the estate of Lewis Luckenbach, of which you were trustee, you individually, and one other estate?

A. Yes; the estate of Edward Luckenbach.

Q. Now, was Edward Luckenbach alive at that time?

A. Yes.

Q. Where did they reside?

A. Brooklyn.

Q. Both of them?

A. Yes.

Q. And the value of their interests in this vessel was necessarily appraised in the proceedings for the administration of their estates?

A. Yes.

Redirect examination by Mr. Carter:

377 Q. Mr. Luckenbach, in reference to the insurance on the Julia Luckenbach, as you stated at $100,000, that valuation, was it or was it not accepted at the request of the underwriters, they being willing to take the risk for that amount, you paying the premium?

A. Yes.

Q. But the value as placed upon the policies for $100,000, for which you insured and paid the premium upon that amount, that did not, did it, fix her market value at $100,000?

A. No; I could insure her for $250,000 if I paid the premium.

Q. The only question is to pay the premium?

A. Yes.

Q. Now, in reference to the speed of the Julia, and about her repairs, and the general average claims made on her, or claims made up in collision cases, or damage to cargo, you don't have anything to do with that, do you?

A. No; I do not.

Q. You leave that to who in your office?

A. I leave that to Potter.

Q. And he is your manager?

A. Yes.

Q. The same as you did in the repairing or altering of the ship in any way?

A. I leave the engine department and boiler department to Mr. Worke, my port engineer; and the deck department I leave to Captain Connell, my port captain.

Q. And upon them you rely for the ship to be in a seaworthy condition when she arrives or leaves the port?

A. Yes.

Q. From your experience, Mr. Luckenbach, what would you say of the class of vessel like the Julia Luckenbach, what would be the depreciation yearly upon her?

A. On old vessels 10 per cent.

Q. And after a certain time, when you come to dispose of the vessel, it is what you can recover for her or receive in the market on sale? There is no fixed price which you can get, is there?

A. Usually an old vessel sells for the price of junk.

Q. I mean after a certain time, when you allow a depreciation yearly, there is a time comes when, if you wish to dispose of the vessel in the open market, you have to take what is going, you have to take whatever price is paid?

378

A. Yes.

By Mr. Kneeland:

Q. Mr. Luckenbach, you knew this vessel was carrying sugar under this charter?

A. Yes; at times she carried sugar.

Q. You knew as a general thing she was carrying sugar on the return voyage from Porto Rico?

A. No; I didn't know that.

Q. You are aware that in the charter party which you signed you agreed, on behalf of yourself and the other owners, to maintain the ship in an efficient condition as to hull and machinery throughout the service?

Mr. Carter: I object to that question, as having been gone thoroughly into on the trial of the case before the Court, and not within the issues now before the Court.

A. Yes.

Q. Did you make any inquiries of either of the persons you have mentioned, to whom you trusted the matter of repairing this vessel, as to what examination had been made of her plating?

A. No.

By Mr. Kirlin:

Q. You are an owner of steamers, or part owner, are you not?

A. Yes.

Q. How many of them?

A. Twelve steamers.

Q. Of twelve steamers?

A. Yes.

Q. Whose name did you mention besides Potter as having to do with the repairs?

A. Mr. Worke and Captain Connell.

Q. Had these gentlemen had any experience in the upkeep of vessels engaged in carrying sugar from Porto Rico?

379

A. Yes.

Q. For what length of time?

A. I don't know that.

Q. Were any of your other vessels chartered to the Insular Line?

A. Yes.

Q. What other ones?

A. The Harry Luckenbach, the S. V. Luckenbach, the F. J. Luckenbach, the San Mateo.

Q. Had they all carried sugar cargoes?

A. Yes.

Q. Did Mr. Potter know the peculiar liability of vessels carrying

sugar cargoes to deterioration from the drainage of sugar, so far as you know?

Mr. Carter: Objected to — incompetent, and not within the issues in this case, having been disposed of by the Court.

A. I don't know what he knew.
Q. All these vessels have the American flag, have they?
A. Yes.
Q. You got the flag for this vessel after you bought her and repaired her?
A. Yes.
Q. Her cost to you at the auction was how much, did you say?
A. I don't remember.
Q. Well, that is a matter that is on your books, is it not?
A. I don't believe we have anything as old as that.
Q. Well, the vessel had to be valued after her repairs, for flag purposes, did she not?
A. No; that wouldn't necessarily follow.
Q. Under the law that existed at that time, was it not necessary to entitle the vessel to the privilege of the flag, that the repairs done upon her must amount to a certain percentage of her value when repaired?
A. I think the law at that time was if you spent three times the purchase price on her you were entitled to the flag.
380 Q. And did the repairs equal three times the purchase value?
A. I think they did.
Q. Well, I think we ought to have the amount of the purchase price of that boat, and the repairs. Have you anything on your books that will show that?
A. No; we have not.
Q. You haven't any recollection at all about it?
A. No; I give you the best recollection I have about it.

Mr. Carter: For the claimants I object to this line of examination continuing any further, as the question of what she cost as a wreck is immaterial and too remote, being some ten years since she was purchased.

Mr. Kirlin: Deterioration is to be computed and it is necessary to have a starting point.

Q. Was she very badly damaged at the time she was purchased?
A. Yes.
Q. Where had she been ashore?
A. She was ashore in Florida, on the coral reefs.
Q. Where was she repaired?
A. Here in New York.
Q. By whom?
A. I think the old Morse Iron Works at 26th Street, Brooklyn, that is failed, repaired her.
Q. That is, the predecessor of the present yard?

A. No. I think when Morse failed he started a new company, and they moved away from there to Fifty-fifth Street.

Q. Who was the head of the company at that time?

A. Morse, the same man that is president of the Morse Dry Dock Company now.

Q. President of the present Morse Company?

A. Yes.

381 Mr. Carter: Mr. Carter, for the claimants and owners of the steamship Julia Luckenbach, says that the charter hire, representing the owners' interest in the freight for the voyage from April 13th to 30th, 1912, eighteen days, at $200.00 per day, amounts to $3,600, and for the month of May, from the 1st to the 25th—taking it on the basis of 25/31sts, being a calendar month—amounts to $4,838.71, total amount, $8,438.71, subject to the right of the claimants to raise the question whether or not the voyage of the Julia Luckenbach ended on her arrival at San Juan, and the voyage when the accident happened to the cargo started at San Juan, or whether it continued until the discharge of the cargo at Philadelphia on the 25th day of May, 1912.

Mr. Kneeland: I am willing to agree that the $8,438.71 represents the charter hire for the period named.

Mr. Kirlin: I also agree.

Mr. Kirlin: If it should be considered that the depositions taken at the trial are not in, we will offer the deposition of James Dalton, taken on behalf of the Insular Line.

Mr. Kneeland: If they are not already in, I will ask to offer the depositions of Hartvig A. Bagger and Hugh G. Jobson, taken on behalf of the libelant.

Mr. Carter: I offer all of the depositions taken on behalf of the claimants of the steamship out of Court.

382 EXHIBIT ATTACHED TO DEPOSITION.

January 27th, 1912.

S/s Julia Luckenbach, Dr., to Empire Repair & Electric Welding Co.

$5,291.71.

Cutting out and renewing ten broken stem plates. Removing port and starboard hawse pipe doubling plates and refitting same. Removing port hawse pipe and fitting new one in place. Removing starboard hawse pipe and refitting same. Removing and refitting cast iron mooring chock on starboard bow. Renewing wooden deck around hawse pipes. Cutting out and part renewing four broken frames, starboard bow. Cutting out between deck stringer plates in way of shell and riveting. Cutting out and renewing stringer shell clips in way of damage. Cutting out broken cement in way of damaged plates. Cutting out and renewing paint locker on main deck. Cutting out and renewing two wooden lockers in between decks. Refastening rail stanchion on port bow. Removing wood chock on starboard bow and renewing same. Caulking stem rivets and

plate edges below damage. Removing, fairing and refitting one stem plate port side. Fairing five stem plates in place. Fairing stem in place. Painting new and repaired work. Renewing broken cement in way of repairs.

| | | | | |
|---|---|---|---|---|
| 2,245 | lbs. | cast iron | at .05 | 112.25 |
| 440 | " | best rivets | " .08 | 35.20 |
| 1,347 | " | rivets | " .06 | 80.82 |
| 9,943 | " | Steel | " .04 | 397.72 |
| 320 | " | angle iron | " .04 | 12.80 |
| 55 | " | iron | " .04 | 2.20 |
| 48 | " | B. B. iron | " .06 | 2.88 |
| 3 | " | black spikes | " .08 | .24 |
| 6 | " | nails | " .06 | .36 |
| 383 | | | | |
| 100 | " | red lead | " .10 | 10.00 |
| 100 | " | white lead | " .10 | 10.00 |
| 10 | " | galv. tacks | " .12 | 1.20 |
| 13 | bags | cement | " .45 | 5.85 |
| 25 | gals. | colza oil | " .70 | 17.50 |
| 11 | " | kerosene oil | " .15½ | 1.71 |
| 6 | candles | | " .02 | .12 |
| 59 | hand | lamps | " .15 | 8.85 |
| 14 | balls | lamp wick | " .05 | .70 |
| | | Screw | .... | .26 |
| | | bolts, nuts and washers | .... | 24.58 |
| 5 | gals. | red lead paint | " 1.80 | 9.00 |
| 10 | " | hull black | " 1.40 | 14.00 |
| 21 | lbs. | oakum | " .10 | 2.10 |
| 30 | ft. | W. pine | " .10 | 3.00 |
| 133 | " | yellow pine | " .06 | 7.98 |
| 442 | " | spruce | " .05 | 22.10 |
| 2,496 | " | Templet lumber | " .05 | 124.80 |
| 4 | shts. | tin | " .12 | .48 |
| 74 | hrs. | forge | " 1.00 | 74.00 |
| 129½ | " | air compressor | " 2.50 | 323.75 |
| 159 | " | punch, shears, rolls and countersinker | " .65 | 103.35 |
| 14 | " | bolt machine | .... | 9.10 |
| 37 | " | drill | " .65 | 24.05 |
| 679½ | days | boilermakers | " 4.00 | 2,718.00 |
| 79⅝ | " | do. helpers | " 3.00 | 238.88 |
| 1⅛ | " | machinists | " 4.00 | 4.50 |
| 1 | " | do. helper | .... | 3.00 |
| 16 | " | carpenters and caulkers | " 4.00 | 64.00 |
| 157¾ | " | riggers | " 3.50 | 552.13 |
| 2½ | " | patternmaker | " 5.00 | 12.50 |
| 46½ | " | foreman | " 5.50 | 255.75 |
| | | | | $5,291.71 |

Approved.
(Signed) HENRY H. MASTERS.

384 *Notice of Motion for Limitation of Liability.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,

vs.

The Steamship Julia Luckenbach and The Insular Line, Inc., and Edgar F. Luckenbach et al., etc.

*Notice of Motion.*

Sirs: Please take notice, that, in accordance with the Sixteenth Article of the answer of the claimants of the steamship Julia Luckenbach, and on the testimony taken in Court on the trial of the case and the depositions taken out of Court on behalf of the claimants and owners of the said steamship, with the right reserved to the claimants and owners of the said steamship to take further testimony to establish their right to limit their liability if they are so advised by their counsel, an application will be made before the Honorable Charles M. Hough, one of the Judges of this Court, at his Chambers in the Woolworth Building, 12th Floor, 233 Broadway, Borough of Manhattan, City of New York, on the 23rd day of September, 1914, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, by the claimants and owners of the said steamship for permission to establish their right to a limitation of their
385 liability to the value of their interest in the said steamship at the time of or immediately after the accident mentioned in the libel and answer, and the ending of said voyage as set forth in claimant's answer, and for a decision on same, as the damages claimed and set forth in the said libel were done or occasioned without the privity or knowledge of the claimants and owners of the said steamship; and that the claimants and owners of the said steamship may have such other and further relief in the premises as they may be entitled to receive.

Dated, September 22, 1914.

Yours, etc.

PETER S. CARTER,
CHARLES C. BURLINGHAM,
*Proctors for Claimants and Owners of the Steamship Julia Luckenbach.*

To:

Kneeland, Harison & Hewitt, Esqs., Proctors for Libelant.
Convers & Kirlin, Esqs., Proctors for Insular Line.

386 *Opinion Granting Limitation of Liability.*

District Court of the United States, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,

vs.

The Steamship Julia Luckenbach, Her Engines, &c.; Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Managing Owner, Claimant on Behalf of Himself and the Other Owners of the Said Julia Luckenbach, and the Insular Line, Claimants and Respondents, and Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Edgar F. Luckenbach, individually, and John Weber and Hattie W. Luckenbach, Executors of the Estate of Edward Luckenbach, Impleaded at the Instance of the Insular Line.

This cause was tried upon the merits and decisions rendered January 22, 1914. Reference was ordered to ascertain damages. Said damages having been duly ascertained, the parties
387 impleaded moved for a declaration that they are entitled to a limitation of liability under and pursuant to Revised Statutes 4283 et seq.

Mr. Carter and Mr. Burlingham, for the claimants of SS. Julia Luckenbach, and the parties impleaded.
Mr. Kneeland, for libelant.
Mr. Kirlin, for Insular Line.

Mr. Carter offered in evidence the deposition of Edgar F. Luckenbach, dated May 11, 1914.

It was agreed in open Court that the damages of the libelant amounted to the sum of $87,526.65, with interest from May 25, 1912.

It was admitted that the pending freight of the said Julia Luckenbach amounted to the sum of $6,600, and that interest had accrued thereon from said May 25, 1912.

It was admitted that a stipulation for value releasing the Julia Luckenbach from actual seizure by the Marshal of this District had been given in the sum of $60,000.

The claimants and owners of said Julia Luckenbach then moved the court to limit the recovery herein to the said sum of $60,000 alleged to be the full value of the Luckenbach after disaster, plus pending freight as above, or, in all, the sum of $66,600, with lawful interest thereon from May 25, 1912.

Hough, *D. J.:*

The first inquiry is as to the value of the Luckenbach in her injured condition in May, 1912. The libel was originally filed for $60,000 and the vessel was discharged on a stipulation for value for

that amount. The next month the ad damnum of the libel
388 was raised to substantially the amount proven and admitted at this hearing. Several months later the claimants and owners filed their answer, claiming limitation and asserting a value of $60,000.

No effort was ever made to re-seize the vessel or get further security. There never was an appraisement of the vessel herein, and no evidence as to her value has been introduced by the parties who now object to a $60,000 valuation. So far as opinion evidence goes it is all to the effect that $60,000 was her value; the acts of the objecting parties confirm that view. The history of the vessel is that she was first the Zaandam of the Holland-American Line, then the Styria, and finally, about ten years before this disaster, the Julia Luckenbach. These names are so familiar in the records of this Court that judicial notice might almost be taken of the fact that she was a very old vessel, built of iron, which obtained an American registry under the Wreck Statutes, and cost about $80,000 ten years before her owners valued her at $60,000.

She was wholly lost at sea about eight months after the injury which gave rise to this litigation, and was then insured for $100,000. In 1909 Mr. Frank S. Martin appraised her at $70,000.

On the whole I am of opinion that the evidence is overwhelming that $60,000 was full value for her in May, 1912. The amount of insurance is evidence of nothing but how large a premium owners were willing to pay to insurers who wanted the money.

In May, 1912, the Julia Luckenbach was and had been since May 31, 1911, under charter to the Insular Line.

By that charter party the steamer was to be placed at the disposal of the charterers on said May 31st, being then "tight, staunch,
389 strong and in every way fitted for the service". The charter also contained the usual provision that the owner should "maintain (the steamer) in a thoroughly efficient state in hull and machinery for and during the service"; and was signed "Estate of Lewis Luckenbach, per Edgar F. Luckenbach, Trustee". By the pleadings it is admitted that the Lewis Luckenbach estate did not own all the steamer, and that the charter party was made by Mr. Edgar F. Luckenbach on behalf of all the owners. All the owners having been impleaded, have appeared and made the foregoing admission. The charter party is therefore regarded as the contract of all the owners through their duly authorized agent and managing owner, Mr. Luckenbach.

The libelant shipped its sugar under a bill of lading issued by the Insular Line. It is admitted that under the findings of the Court heretofore made that bill of lading affords no defence to libelant's demand. It follows that since (as has been found) the loss complained of was caused by unseaworthiness of the Luckenbach, existing at the beginning of the voyage from Porto Rico to Philadelphia, the libelant must recover in rem up to the stipulated value of the vessel, and obtain the overplus from the Insular Line, which in turn has recourse against the impleaded owners of the

steamer, unless said owners can obtain the limitation for which they now move.*

The case therefore is considered as though there were but one owner and he had personally signed the charter party.

390 It has been affirmatively shown that the owners of the Julia Luckenbach were not privy to, nor had they knowledge of her unseaworthiness. The meaning of these words has been sufficiently considered in Quinlan v. Pew, 56 Fed. Rep., 111.

They failed to use due diligence in keeping their vessel seaworthy, because the competent men whom they employed to supervise and inspect the steamer so failed—within the stringent rules laid down by the Courts. Perhaps it is more accurate to say that their own diligence was unavailing,—under the law.

But it does not follow that because errors, omissions or mistakes were made by their properly selected servants, that they must stand ultimately responsible in solido. Primary liability is to be imputed to them, but neither privity nor knowledge is to be so imputed.

It is indeed admitted that owners' liability should under the statute be limited to the value found, were it not that such owners made a personal contract when Mr. Luckenbach signed the charter party. From this fact and this alone, under The Loyal, 204 Fed. Rep., 930, and Benner Line v. Pendleton (C. C. A., June, 1914), it is confidently urged that limitation must be denied.

Ruling decisions must be followed, as long as their authority is unimpaired, but the frank expression of opinion is a professional right.

I am respectfully but firmly convinced that The Loyal (supra) was rightly decided, for the reasons given by Ward, J., viz: The owner had not shown absence of privity or knowledge.

But the reasons advanced in the prevailing opinion of Noyes, J., asserted to rest on the language of Great Lakes Towing Co. v. Mills Trans. Co., 155 Fed. Rep., 11, have led to the judgment entered in Brenner Line v. Pendleton (supra).

391 That a ship owner cannot limit for the consequences of his own fault or neglect is elementary, for no such act or omission can be conceived without fixing such owner with either privity or knowledge, or both. That he cannot escape fulfilment of his own contract has been often held (Richardson v. Harmon, 222 U. S., 96, and cases cited), but never until Benner Line v. Pendleton (supra) was such a contract as a charter party considered as a contract preventing limitation.

The Great Lakes Towing Company case arose out of a written agreement whereby respondent promised to pay libelant for (inter alia) "wrecking or bottom" work. Such work was done to a vessel

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*The question whether owners other than Mr. Edgar F. Luckenbach are or are not entitled to limit liability, has not been argued. Owners' counsel have assumed that each owner is ready and able to pay his appropriate fraction of the loss, if limitation as for a single owner is denied.

of respondent's, which nevertheless became almost a total loss; whereupon respondent endeavored to limit payment to the value of the remnant of its vessel. It was held upon abundant authority that the payment of a debt formally contracted for, could not be thus avoided by the contractor.

Every case cited, or to be found before the Great Lakes Towing Company decision, and laying down the doctrine that a ship owner cannot limit for his own contract, shows the same kind of contract, viz: An agreement to pay money, in such wise that an action in debt or assumpsit would have laid therefor.

There is no case before The Loyal (supra) where an owner, free of privity or knowledge, was refused limitation because he personally made a contract which had to be performed by the ship; which contemplated and required service by the ship, as a prerequisite to pecuniary reward. Nor indeed is The Loyal such a case on its facts—but the language of the Court (p. 932 especially) invites to the belief that signature of an agreement to furnish a ship, not only raises the irrebutable presumption of an agreement to furnish
392 a seaworthy ship (which no one doubts)—but makes the signer liable in solido and without limitation for all the consequences of unseaworthiness, even though he employ the best men, spends all the money demanded, and is himself so unskilled in seamanship and shipbuilding as to be personally unable to ascertain the facts which condemn him to liability.

Indeed, it is not seen (the Statute of Frauds perhaps aside) why a written agreement or contract is necessary—the same consequences would apparently flow from a verbal charter.

For this doctrine the case relied on (Great Lakes Towing Co. v. Mills Trans. Co., supra) is not authority. To make it so the facts must be inverted. If the libelant in that case had without privity or knowledge of defects furnished an unseaworthy tug, whereby respondent had received damage, there is nothing in the language of the Court to show that limitation would have been refused on account of the existence of the contract.

Lurton, J., as a Circuit Judge, was of the Court which decided The Great Lakes Towing Company case. When he referred to it in Richardson v. Harmon (supra) he said that the construction of the statute made in that and other cases "harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, * * * but leaves him liable for his own fault, neglect and contracts." To quote this remark or any of the cases cited by its maker, as justifying the doctrine that every contract without regard to its nature or method of performance, puts the contractor outside the limitation laws is (to say the least) singular. The master and crew of a ship when navigating or otherwise managing the vessel are acting as the agents of the owner in the fulfilment of that owner's contract. There is no magic in the word "contract,"
393 nor in the office of mariner; the logical reason why the owner is not deprived of limitation by negligence of master and crew is that he is necessarily fulfilling his contract by deputy,

and the very intent of the limitation acts is to put a measure on the quantum of liability which the owner acting through well-selected agents must assume. It is necessary for an owner to employ master and crew to navigate his vessel, it is just as necessary for him to employ agents, inspectors, shipwrights and the like to inspect his vessel in order to ascertain her condition before the voyage begins. The same reason should lead to the same results in both cases.

But the matter has been considered before now and in this Circuit. The petition for limitation of the owners of the Republic was denied by Benedict, J. (57 Fed. Rep., 240), because the vessel was unseaworthy. The Court said (p. 242), the owners "are chargeable with knowledge of what they might have known and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put. An owner of a ship cannot be permitted to free himself from an obligation of this character by remaining in ignorance of what it is within his power to know."

The owners of the Republic had made no written charter party; they apparently operated their boat themselves, but if there had been a written charter party into which to read a warranty of seaworthiness, this language of Benedict, J., is exactly the doctrine of Benner Line v. Pendleton.*

394 In the Circuit Court of Appeals 61 Fed. Rep., 109), Wallace, J., pointed out that the ground of decision below was "an implied warranty on the part of the (ship owner) that the barge was reasonably fit for the service for which she was chartered." This doctrine was not approved of; but in affirming the judgment it was said:

"The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be a hard construction of the statute which would deprive the ship owner of protection under such circumstances."

Later the same Court laid down as an established rule (The Tommy, 151 Fed. Rep., at 573).

"that where the owner has provided a suitable person or persons as his agent to inspect or provide for the proper equipment of the vessel, he is not deprived of the benefit of the statute limiting

*The owners of the Republic sold passage tickets, or hired out their barge by the day; that was their business. Why was not every ticket a personal contract, importing a warranty of a seaworthy vessel? Each daily hiring was certainly a charter.

liability by proof of negligence of such agents where he has had no notice or knowledge of such negligence or resultant defect."

These citations seem sufficient to justify the assertion that the officers and crew of a ship are not the only agents of an
395 owner who may plunge him into liability, but only to the extent of ship and pending freight; and to show it as old doctrine that an implied warranty of seaworthiness does not of itself defeat limitation.

Yet the Benner Line case puts liability without limitation flatly on the ground of the existence of a contract containing that very implication, for the Court concedes that the owner in that case "thought (his vessel) was in a seaworthy condition at the time she started on her voyage," and does not advert to any evidence whatever tending to show absence of privity or knowledge.

It seems, therefore, that the last judgment of the Circuit Court of Appeals for this Circuit perceives a difference between an implication of seaworthiness arising from soliciting freight or passengers, and the same implication arising from a written charter: and it certainly holds that the ordinary charter party not only contains an implied warranty of seaworthiness (which is of course), but prevents the maker of said charter party from even offering to show that said unseaworthiness arose without his privity or knowledge. This is equivalent to holding that every ship owner who signs a charter party (or perhaps charters his vessel orally) is conclusively presumed to be privy and knowing to every detail of his vessel's construction, equipment or apparatus which may affect seaworthiness.

In the case of The Loyal there was no charter party, but an agreement which permitted, if it did not require, the employment of any convenient lighter. There is nothing in opinion or evidence to show whether the respondent used the same lighter once or many times.

396 In the Benner Line case the charter party was for a single voyage, the unseaworthiness developed upon that voyage, and the charter maker was held for the familiar breach. In this case unseaworthiness developed or was discovered on a voyage which began a year after the charter party was made, and the charter was to endure for three years and seven months.

The Julia Luckenbach had made many chartered voyages before disaster overtook her.

It is said that the maintenance clause in the charter party, viz: The owner's agreement to maintain the steamer "in a thoroughly efficient state in hull and machinery," must in the light of the Benner Line case be construed as an extension of the warranty of seaworthiness at the beginning of the period of hire (admitted to inhere every charter party) into a warranty of seaworthiness continuing throughout the entire period of the charter, viz: Three years and seven months.

There could not be a better example of the extraordinary nature of the rule contended for than is afforded by the facts herein.

This charter party was not a demise; the Insular Line were

not owners pro hac vice, but within very wide limits they had a right to send the Julia Luckenbach wherever they wished. They could decide as to the character of cargo, and, as has been shown herein, on the character of the cargo largely depends the degree of danger to the vessel.

It is right—and has never been doubted—that the owner who time charters his vessel thereby binds his vessel to whatever lawful freight the charterers put in her, and for the safe transportation and delivery of that freight he should hazard his vessel. But to bind himself to an unlimited liability by such charter party
397 for a period of years is a most extreme contention—and (accepting the Benner Line decision at full value) it depends solely on the meaning to be given to the language of the maintenance clause.

In a case where the demand of the charterers was far less extreme than that here propounded, this question has been considered.

In Giertsen v. Turnbull (Sessions Cases 1907-1908, p. 1101) it was held that a series of voyages under time charter did not come within the stages-of-voyage doctrine of The Vortigern (1898 Pr., 140), and also that in a time charter

"the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary repairs."

The doctrine of this case has been received without comment or objection by Messrs. Scrutton and Carver.

If one accepts, therefore, the doctrine that a ship owner who charters out a vessel unseaworthy at the commencement of the hiring period is liable without limitation, it is not necessary to hold that the ordinary form of time charter here before the Court contains an implied warranty of seaworthiness extending through the whole period of chartering.

398 At the time of voyage begun, therefore, the warranty of seaworthiness of the Julia Luckenbach had (as between charter-s and owners) been exhausted; and there was no contract between them by which owners bound themselves absolutely to maintain seaworthiness, and also gave up the benefit of statutes which merely embody many centuries of Admiralty law.

The motion for limitation is granted.

Oct. 12, 1914.

C. M. HOUGH, *D. J.*

399 *Final Decree.*

At a stated term of the District Court of the United States for the Southern District of New York, held at the court rooms, in the Borough of Manhattan, City of New York, on the 25th day of November, 1914.

Present:

Hon. Charles M. Hough, United States District Judge.

W. J. McCahan Sugar Refining Company, Libelant.

versus

The Steamship Julia Luckenbach, Her Engines, etc.; Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Claimant; The Insular Line, Respondent, and Edgar F. Luckenbach, Individually and as Trustee of the Estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, Executors of the Estate of Edward Luckenbach, Impleaded, Respondents.

An interlocutory decree having been entered herein on the 7th day of February, 1914, whereby it was ordered, adjudged and decreed that the libelant recover from the claimant of the
400 steamship Julia Luckenbach, and from the respondents Edgar F. Luckenbach et al., her owners, and from the respondent Insular Line, the amount of the damages sustained by it by reason of the matters alleged in the libel, with interest and costs; and that libelant recover its said damages, in the first instance, from the claimant and the respondents, Edgar F. Luckenbach et al., owners of said steamship; that any balance remaining uncollected after execution returned (or its equivalent) from the claimant and respondents Edgar F. Luckenbach et al., owners of said steamship, be recovered by the libelant from the respondent Insular Line, and the respondent Insular Line recover such amount as it shall pay the libelant from the respondents Edgar F. Luckenbach et al., owners of the steamship Julia Luckenbach.

And the parties hereto having stipulated and agreed that the amount of the damages sustained by the libelant is the sum of Eighty-seven thousand five hundred and twenty-six 65/100 dollars ($87,526.65), with interest thereon from the 25th day of May, 1912, as appears by the stipulation signed by the proctors for the respective parties, filed herewith.

And further testimony having been introduced on behalf of the owners of the steamship Julia Luckenbach in support of their claim that their liability should be limited to the value of their interests in said steamship at the end of the voyage upon which the damages alleged in the libel was occasioned, and her freight then pending.

And said testimony having been considered and argument by counsel for the respective parties having been heard;

401 Now, on motion of Kneeland, Harison & Hewitt, proctors for libelant, it is

Ordered, adjudged and decreed that the damages sustained by the libelant were occasioned without the privity or knowledge of the owners of the steamship Julia Luckenbach, and that the liability of the claimant and the respondents Edgar F. Luckenbach, individually and as trustee of the estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, herein, be and is limited to the value of their interests in said vessel and her pending freight, which is hereby adjudged to be the sum of $66,600, with interest thereon from the 25th day of May, 1912; and it is further

Ordered, adjudged and decreed that the libelant, W. J. McCahan Sugar Refining Company, recover herein the sum of $87,526.65, with the further sum of $13,129 interest thereon, together with its costs taxed at the sum of $119.22, and amounting in all to the sum of $100,774.87; and that of the total sum decreed to it as aforesaid, the libelant recover of the claimant and respondents Edgar F. Luckenbach, individually and as trustee of the estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Lewis Luckenbach, the sum of $66,600, with $9,990 interest thereon, and $119.22 costs, amounting in all to $76,709.22; and recover of the respondent Insular Line the sum of $24,155.65; and it is further

Ordered, adjudged and decreed that in case any part of the $76,709.22 hereinabove adjudged to be paid to the libelant by the claimant and respondents Edgar F. Luckenbach et al., remain unpaid after execution returned (or its equivalent), the libelant recover the amount so unpaid from the respondent Insular Line; and that the respondent Insular Line recover of the respondents Edgar F. Luckenbach, individually and as trustee of the estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach, any part of said sum of $76,709.22, which it may so pay to the libelant; and it is further

402

Ordered, adjudged and decreed that the respondent Insular Line recover of the impleaded respondents Edgar F. Luckenbach et al. the sum of $127.97, its costs as taxed, and that the petition of said Insular Line to be indemnified by the impleaded respondents Edgar F. Luckenbach et al. to the extent of the $76,709.22 hereinabove decreed, to be paid by it to the libelant, be and hereby is denied; and it is further

Ordered, adjudged and decreed that upon the payment by the claimants and owners of the steamship Julia Luckenbach of the amount hereinabove decreed to be paid by them to the libelant, the said libelant and the respondent Insular Line, their and each of their successors and assigns refrain from further prosecution of any or all suits, actions or proceedings against the steamship Julia Luckenbach, her claimant and owners, to recover for the loss, damage and injury sustained by the libelant and by the Insular Line as aforesaid; and it is further

Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal be taken therefrom within the time limited by
403 the rules and practice of this Court, the stipulation for costs and value on the part of the claimant and the stipulators for costs on the part of the respondent Insular Line, and impleaded respondents Edgar F. Luckenbach et al., cause the engagements of their said stipulations to be performed or show cause within four days after the expiration of said time to appeal or on the first day of jurisdiction thereafter, why execution should not issue in accordance with the terms of their said stipulations.

C. M. HOUGH, *D. J.*

404 *Notice of Filing of Final Decree.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,

versus

The Steamship Julia Luckenbach, Her Engines, etc.; Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Claimant; The Insular Line, Respondent, and Edgar F. Luckenbach, Individually and as Trustee of the Estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, Executors of the Estate of Edward Luckenbach, Impleaded, Respondents.

Please take notice that a final decree, of which the annexed is a copy, was this day duly filed and entered in the office of the Clerk of the United States District Court for the Southern District
405 of New York, in the Post Office Building, in the Borough of Manhattan and City of New York.

Dated, New York, January 6, 1914.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant.*

To Peter S. Carter, Esq., Proctor for Edgar F. Luckenbach, Claimant, et al.; Messrs. Convers & Kirlin, Proctors for Insular Line, Respondent.

406 *Claimant's Notice of Appeal.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant-Appellee,

against

THE STEAMSHIP JULIA LUCKENBACH, EDGAR F. LUCKENBACH et al., etc., Claimants-Respondents-Appellants, and The Insular Line Respondent-Appellee.

Notice of Appeal.

SIRS: Please take notice, that Edgar F. Luckenbach et al., etc., owners of the steamship Julia Luckenbach, claimants and respondents, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered herein January 6th, 1915, in so far as it decrees to the libelant the recovery of any sum whatever against said steamship Julia Luckenbach, Edgar F. Luckenbach et al., claimants and respondents.

Dated, January 9, 1915.

Yours, etc.,

PETER S. CARTER,
*Proctor for Edgar F. Luckenbach et al., etc., Claimants and Respondents, 15 Whitehall Street, Manhattan, New York City.*

407 To Alexander Gilchrist, Jr., Esq., Clerk U. S. District Court; Kneeland, Harison & Hewitt, Esqs., Proctors for Libelant; Convers & Kirlin, Esqs., Proctors for The Insular Line.

408 *Assignments of Error.*

United States District Court, Southern District of New York.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libelant-Appellee,

against

THE STEAMSHIP JULIA LUCKENBACH, EDGAR F. LUCKENBACH et al., etc., Claimants-Respondents-Appellants, and The Insular Line Respondent-Appellee.

Assignments of Error.

The above-named Edgar F. Luckenbach et al., etc., owners of the steamship Julia Luckenbach, claimants and respondents, hereby assign error in the final decree of the District Court of the United

States for the Southern District of New York, entered herein January 6th, 1915, in the following particulars:

First. The Court erred in finding that the steamship Julia Luckenbach was unseaworthy at the commencement of her voyage from San Juan, Porto Rico, on or about the 25th of April, 1912, or when she started from New York on her voyage to Porto Rico on or about the 13th of April, 1912.

Second. The Court erred in finding Edgar F. Luckenbach et al., etc., as Owners of the steamship Julia Luckenbach, claim-
409 ants and respondents, did not use due diligence to make the said steamship seaworthy.

Third. The Court erred in finding that the puncture or hole discovered in the plate on the starboard side (strake B) of said steamship Julia Luckenbach, when she returned to San Juan in a leaking condition, was not caused by said vessel lying aground, or by some hard substance puncturing the plate on the starboard side from the outside while she was lying aground, at the Quartermaster's Dock at San Juan, loading.

Fourth. The Court erred in not finding that the Insular Line, as charterer of the said steamship Julia Luckenbach, is liable for the injury the said steamship sustained while she was lying at the Quartermaster's Dock at San Juan, loading, for under the terms and conditions of the charter party the charterer was in full possession and control of the said steamship in selecting and designating the dock or place at which she was to load, and, therefore, liable for the damages the cargo of sugar sustained.

Fifth. The Court erred in finding that Edgar F. Luckenbach et al., etc., the claimants and respondents, were not entitled to have the benefit of the insurance effected by the libelant, the shipper, owner or consignee of the cargo, in accordance with the terms and conditions of the bill of lading issued by the Insular Line and accepted by the libelant, the shipper, owner or consignee of the cargo.

410 Sixth. The Court erred in not dismissing the libel against the said steamship Julia Luckenbach, and Edgar F. Luckenbach et al., etc., respondents.

Dated, January 9, 1915.

PETER S. CARTER,
*Proctors for Edgar F. Luckenbach et al., etc., Claimants and Respondents.*

To Alexander Gilchrist, Jr., Esq., Clerk U. S. District Court; Kneeland, Harison & Hewitt, Esqs., Proctors for Libelant; Convers & Kirlin, Esqs., Proctors for The Insular Line.

411 *Notice of Appeal by Insular Line.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant,

against

The Steamship Julia Luckenbach, Her Engines, etc.; Edgar F. Luckenbach, Sole Trustee of the Estate of Lewis Luckenbach, Claimant; The Insular Line, Respondent, and Edgar F. Luckenbach, Individually and as Trustee of the Estate of Lewis Luckenbach, and John W. Weber and Hattie W. Luckenbach, Executors of the Estate of Edward Luckenbach, Impleaded, Respondents.

Notice of Appeal.

Sirs: Please take notice that the Insular Line, the respondents above named, hereby appeals from the final decree made and entered herein on the 6th day of January, 1915, to the Circuit
412 Court of Appeals for the Second Circuit, and from each and every part thereof.

Dated: New York, January 14, 1915.

Yours, &c.,

CONVERS & KIRLIN,
*Proctors for Insular Line.*

To Alexander Gilchrist, Jr., Esq., Clerk; Kneeland, Harison & Hewitt, Esqrs., Proctors for Libelant; Peter S. Carter, Esq., Proctor for Edgar F. Luckenbach, Claimant, and Edgar F. Luckenbach et al., Respondents, Impleaded.

413 *Assignments of Error.*

United States District Court, Southern District of New York.

The W. J. McCahan Sugar Refining Company, Libelant-Appellee,

against

Steamship Julia Luckenbach, Edgar F. Luckenbach et al., Claimants-Respondents-Appellants; The Insular Line, Respondent-Appellant.

Assignments of Errors.

The Court erred in the following particulars, to wit:

1. In finding that the owners of the steamship did not exercise due diligence to make her seaworthy at the commencement of her voyage from San Juan, Porto Rico, on or about the 25th of April, 1912, or when she started from New York on her voyage to Porto Rico, on or about the 13th of April, 1912.

2. In not finding that owners used due diligence to make the ship seaworthy for the voyage and in refusing to find that this respondent, the Insular Line, was relieved from responsibility for the damage complained of, by Section 3 of the Harter Act, and by the exceptions contained in the bill of lading.

3. In refusing to hold that the settlement of the insurance
414 effected on the goods was in effect a payment of the loss, and that it inured, under the contract of carriage, to the benefit of the Insular Line and diminished pro tanto any liability on its part to the libelant.

4. In holding that the owners were entitled, under and pursuant to Revised Statutes, Sec. 4283 et seq., to limit their liability to the sum of $66,600.

5. In failing to hold that the value of the claimants' interest in the vessel and freight exceeded $66,600.

6. In failing to hold that the charter party constituted a personal contract between the owners of the steamer, or at least between Edgar F. Luckenbach, individually and as trustee for the estate of Lewis Luckenbach, and the Insular Line, which barred the said owners' right to a limitation of their liability as between them and the Insular Line.

7. In entering decree against the Insular Line.

8. In not entering decree dismissing the libel.

CONVERS & KIRLIN,
*Proctors for The Insular Line, Appellant.*

415 *Stipulation as to Exhibits.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant-Appellant,

against

The Steamship Julia Luckenbach, Her Engines, etc., Edgar F. Luckenbach et al., etc., Claimants-Respondents-Appellants, and The Insular Line, Respondent-Appellant.

Stipulation as to Exhibits.

It is hereby stipulated and consented by and between the proctors for the respective parties that the following exhibits may be omitted from the printed record on appeal herein, but may be presented to the Court upon the argument of said appeal:

Libelant's Exhibit 11, Bill of Lading.
Claimants' Exhibit A of March 29, 1913, Engineer's Log Book.
Claimants' Exhibit A of April 28, 1913, Chief Officer's Log Book.
Insular Line Exhibit B, Blue-Print of San Juan Harbor.
Insular Line Exhibit D, Bill of Lading.
Insular Line Exhibit E, Diary of Anthor.

Insular Line Exhibit G, Cablegram (cipher).

416 Insular Line Exhibit H, Letter (to which cable was answer).

Dated, New York, September 9th, 1915.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant.*
PETER S. CARTER,
CHARLES C. BURLINGHAM,
*Proctors for Luckenbach, etc., et al.*
CONVERS & KIRLIN,
*Proctors for Insular Line.*

417 *Stipulation as to Record.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant-Appellee,

against

The Steamship Julia Luckenbach, Her Engines, etc., Edgar F. Luckenbach et al., etc., Claimants-Respondents-Appellants, and The Insular Line, Respondent-Appellant.

Stipulation as to Record.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause, for the purpose of this appeal, and that the same may be certified by the Clerk as the record of this appeal.

Dated, New York, September 9th, 1915.

KNEELAND, HARISON & HEWITT,
*Proctors for Libelant.*
PETER S. CARTER,
CHARLES C. BURLINGHAM,
*Proctors for Luckenbach, etc., et al.*
CONVERS & KIRLIN,
*Proctors for Insular Line.*

418 *Clerk's Certificate.*

United States District Court, Southern District of New York.

W. J. McCahan Sugar Refining Company, Libelant-Appellee,

against

The Steamship Julia Luckenbach, Her Engines, etc., Edgar F. Luckenbach et al., etc., Claimants-Respondents-Appellants, and The Insular Line, Respondent-Appellant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 7th day of February, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the said United States the one hundred and fortieth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk*.

(Rev. stamp cancelled.)

419 United States Circuit Court of Appeals for the Second Circuit, October Term, 1915.

No. 277.

Argued May 15, 1916; Decided June 6, 1916.

W. J. McCahan Sugar Refining Company, Libelant-Appellant,

against

The Steamship Julia Luckenbach, Her Engines, etc., Edgar F. Luckenbach et al., etc., Claimants-Respondents-Appellants, and The Insular Line, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Coxe and Ward, Circuit Judges, and Chatfield, District Judge.

On appeal by the charterer of the steamship Julia Luckenbach from a final decree of the District Court for the Southern District of

New York awarding the libelant, the W. J. McCahan Sugar Refining Company, judgment in the sum of $100,774.87.

420

J. PARKER KIRLIN AND
MARK W. MACLAY, JR.,
*For Appellant Insular Line.*
PETER S. CARTER AND
CHARLES C. BURLINGHAM,
*For Claimants-Appellants.*
LAWRENCE KNEELAND,
*For Libelant-Appellee.*

PER CURIAM:

Judge Hough in the two opinions delivered at final hearing and on the limitation of liability, has said practically all that it is necessary to say upon the questions now debated. We may add, however, that we are satisfied that the Luckenbach was unseaworthy as the result of gradual corrosion of the plate at a point where there was no cement or where the cement was cracked.

The contract of carriage was between the McCahan Company and the charterers. The charter, not being a demise, the charterers cannot take advantage of the statute limiting the liability of vessel owners.

The cause of the accident being neither an error of navigation nor of management they are not protected by the third section of the Harter Act.

If the bill of lading contains an exception of unseaworthiness, which we believe it does, the charterers are not protected by the second section of the Act because they have not exercised due diligence in respect to the condition of the steamer.

It follows that the libelant is entitled to recover in full against the charterers unless the clause in the bill of lading as to its insurance protects them. Under prior decisions of this court, Pennsylvania R. R. Co. v. Burr, 130 Fed. Rep., 847; Bradley v. Railway Co., 153 Fed. Rep. 350, it does not and we are not disposed to depart from those decisions. Though the purpose of the insurance company is quite apparent, we can understand a contract of loan which is to be repaid only on a certain condition, e. g., the shipper's recovering against the carrier.

421 As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the Benner Line, 217 Fed. Rep. 497, holds that the owner cannot limit his liability against this express contract.

The decree should be modified so as to award the libelant its full damages, payable primarily out of the steamer and the Estate of Luckenbach, any deficiency to be paid by the charterer, with interest and costs.

422 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office Building in the City of New York, on the 16th day of June, one thousand nine hundred and sixteen.

Present:

Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges; Hon. Thomas I. Chatfield, District Judge.

W. J. McCahan Sugar Refining Company, Libellant-Appellee,

v.

Steamship "Julia Luckenbach," Her Engines, etc.; Edgar Luckenbach et al., Claimants-Appellants; The Insular Line, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified so as to award the libellant its full damages payable primarily out of the steamer and the Estate of Luckenbach, any deficiency to be paid by the charterer, with interest and costs.

A. C. C.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

423 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. McCahan vs. Luckenbach. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 26, 1916. William Parkin, Clerk.

424 United States of America,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 424, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of W. J. McCahan Sugar Refining Company against S. S. "Julia Luckenbach" & The Insular Line as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of September in the year of our Lord One Thousand Nine Hundred and

Sixteen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 9/8/1916.]

425 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Steamship Julia Luckenbach, her engines, etc., Edgar F. Luckenbach, et al., claimants, and The Insular Line are appellants and W. J. McCahan Sugar Refining Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command
426 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of November, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 25,573. Supreme Court of the United States. No. 743, October Term, 1916. Edgar F. Luckenbach et al. vs. W. J. McCahan Sugar Refining Co. Writ of Certorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 21, 1916. William Parkin, Clerk.

427 United States Circuit Court of Appeals for the Second Circuit.

THE W. J. MCCAHAN SUGAR REFINING COMPANY, Libellant-Appellee,

against

THE STEAMSHIP JULIA LUCKENBACH, EDGAR F. LUCKENBACH and Others, Claimants-Appellants-Appellees; and The Insular Line, Respondent-Appellant; and Edgar F. Luckenbach et al., Impleaded, Respondents-Appellants-Appellees.

It is hereby stipulated and agreed that the certified transcript of record on file with the Clerk of the Supreme Court of the United States may be taken as a return to the writ of certiorari granted herein November 6, 1916, No. 743, October Term 1916.

Dated, New York, November 20, 1916.

KNEELAND, HARISON & HEWITT,
*Proctors for W. J. McCahan Sugar Refining Co.*
PETER S. CARTER,
*Proctor for Edgar F. Luckenbach et al.*
KIRLIN, WOOLSEY & HICKOX,
*Proctor for Insular Line.*

428 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. The W. J. McCahan Sugar Refining Company, Libellant-Appellee v. The Steamship Julia Luckenbach et al., Claimants-Appellants-Appellees, and others. Stipulation as to Record on Certiorari. Peter S. Carter, Proctor for Edgar F. Luckenbach et al., Claimants-Appellants-Appellees, 15 Whitehall Street, New York City.

429 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York November 21st, 1916.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

430 [Endorsed:] 743/25,573. United States Circuit Court of Appeals, Second Circuit. W. J. McCahan Sugar Refining Co. v. S. S. "Julia Luckenbach" et al. Return to Certiorari.

431 [Endorsed:] File No. 25,573. Supreme Court U. S. October Term, 1916. Term No. 743. Edgar F. Luckenbach et al., Petitioners, vs. W. J. McCahan Sugar Refining Co. Writ of certiorari and return. Filed November 24, 1916.

-11-

Office Supreme Court, U.
FILED
OCT 24 1916
JAMES D. MAHER
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1916.

No. 751

EDGAR F. LUCKENBACH and others,
(*Claimants-Respondents-Appellants*)
*Petitioners,*

*against*

W. J. McCAHAN SUGAR REFINING COMPANY,
(*Libellant-Appellee*)
*Respondent,*

*and*

THE INSULAR LINE,
(*Respondent-Appellant*)
*Respondent.*

## PETITION AND BRIEF FOR WRIT OF CERTIORARI.

PETER S. CARTER,
*Proctor for Petitioners.*

CHARLES C. BURLINGHAM,
*of Counsel.*

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

# Supreme Court of the United States

OCTOBER TERM, 1916.

No. .

EDGAR F. LUCKENBACH and others
(Claimants-Respondents-Appellants)
Petitioners,

against

W. J. McCAHAN SUGAR REFINING COMPANY
(Libellant-Appellee)
Respondent,

and

THE INSULAR LINE
(Respondent-Appellant)
Respondent.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Edgar F. Luckenbach and others, the petitioners above named, respectfully shows as follows:

FIRST: Section 4283 of the United States Revised Statutes (9 Stat. L., 635) provides:

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Section 18 of the Act of Congress of June 26, 1884 (23 Stat. L., 57), provides:

> "The individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels [*sic*] and freight pending. * * *"

SECOND: The benefit of these statutes has been denied to your petitioners in this case.

Your petitioners were the owners of the steamship *Julia Luckenbach*, whose cargo of sugar became damaged by the entry of sea water while on a voyage from Porto Rico to Philadelphia in April, 1912. Her value was $60,000, and her pending freight was $6,600. The damage was, on November 25, 1914, decreed to be, with interest, $100,774.87. Both the District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit found that the damage was due to unseaworthiness, in that a plate had been cor-

roded through by a mixture of salt water and sugar. The District Court expressly held that the owners were free from privity or knowledge and granted limitation of liability, entered a decree for $76,709.22 (being the value of the vessel, pending freight, interest and costs) against the owners, your petitioners, and assessed the remainder of the damages against the charterer, the Insular Line, which had issued the bills of lading to the owners of the cargo and which had been joined in the suit against the ship. On appeal by the Insular Line the Circuit Court of Appeals reversed the decision of the District Court with respect to limitation of liability and, notwithstanding the owners' freedom from privity or knowledge, decreed that they pay the entire damages.

THIRD: The decision of the Circuit Court of Appeals with respect to limitation of liability purported to be based wholly on its own decision in *Benner Line* v. *Pendleton*, 217 Fed. Rep., 497, to review which this Court granted a writ of certiorari June 12, 1916, under docket No. 1041, October Term, 1915. Your petitioners respectfully refer to the petition and brief in that case to supplement this petition.

The theory of the Circuit Court of Appeals in denying limitation of liability was that your petitioners had entered into a so-called "personal contract" and thus deprived themselves of the benefit of the limited liability statutes. This contract was contained in a time charter party dated October 25, 1910, between the Insular Line and the estate of Lewis Luckenbach, which was signed by Edgar F. Luckenbach, trustee. The charter party was in the familiar form used for many years and contained the usual maintenance clause, reading:

> "1. That the Owner shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. Owner also to furnish blocks and falls as customary for handling cargo up to 3 tons (Gross) in weight, also winches." (Record, fol. 1034.)

The *Julia Luckenbach* had already made several voyages under this charter party at the time of the disaster, extending over nearly a year, all without any material damage to cargo, and it may fairly be presumed that she was seaworthy when delivered to the Insular Line under the charter party. The decision of the Court Court of Appeals that this clause prevented limitation of liability for damage caused by unseaworthiness developing in the course of this voyage was thus an extreme application of the doctrine of the *Benner Line* case, where the question was one of unseaworthiness when the first and only voyage began.

More especially should the writ of certiorari be granted in this case because it was granted in *Benner Line* v. *Pendleton*, which, with respect to limitation of liability, involved exactly the same question as is involved in this case, except that the application of the "personal contract" doctrine was more extreme in this case than in that. If upon the hearing of the writ in the *Benner Line* case this Court should reverse that decision your petitioners conceive that they would be entitled to a reversal of the decision in this case, and that failure to secure such a reversal would amount to a serious denial of justice. As to the question of "personal contract,"

this case is in all important aspects so nearly identical with the *Benner Line* case that this Court might well in its discretion hear argument on both cases at the same time without confusion of the issues.

FOURTH: In the First Circuit the law is established diametrically opposite to that of the Second Circuit as exemplified by this case and also by the *Benner Line* case. In *Quinlan* v. *Pew*, 56 Fed. Rep., 111, 119, PUTNAM, *C. J.*, of the First Circuit, said:

> "*Neither can the proposition of the appellant be maintained that the statute does not apply because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all instances which the statute expressly enumerates as to those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped.* That there may be certain contracts, relating not so much to navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may well be contended, without at all touching the principles here involved." (Italics ours.)

In *Benner Line* v. *Pendleton*, 217 Fed. Rep., 497, 507, ROGERS, *C. J.*, of the Second Circuit, said:

> "The rule that has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or imputed to him by law; *but he may not limit his liability upon*

> *contracts which he personally makes or upon obligations which he personally assumes. If the particular contract is made by the shipowner in person it is a matter of no consequence so far as the question now under consideration is concerned whether it relates to and binds a particular vessel or not. By a 'personal contract' we understand to be meant a contract made by the person or corporation to be bound*, as distinguished from one imputed to such person or corporation." (Italics ours.)

In the case at bar, the Circuit Court of Appeals for the Second Circuit said, *per curiam* (Record, p. 421):

> "As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the *Benner Line*, 217 Fed. Rep., 497, holds that the owner cannot limit his liability against this express contract."

The divergence of decision is thus very clear. In the *Quinlan* case, in the First Circuit, the unseaworthiness involved was that a bull's eye on one of the jib pennants of a chartered vessel was cracked before the voyage commenced and in the course of the voyage caused injury to one of the charterers. In the case at bar and the *Benner Line* case, both in the Second Circuit, the unseaworthiness involved was some insufficiency in the hull, causing damage to cargo while the vessels were under charter. The facts call for the same decision.

It results that a case of this nature must now be decided differently in Boston from what it must be decided in New York, and the rights of shippers

and shipowners, frequently involving enormous sums, depend on the accident of where jurisdiction is secured. Such a condition can only be subversive of commercial and maritime interests, and it is of the utmost public importance that the questions raised by the decision of the Circuit Court of Appeals, both from the point of view of diversity of opinion between circuits and of the vast commercial interests involved, be decided uniformly and correctly. Diversity of decision is almost as baneful as incorrect decision. This case exhibits both diversity of decision and, we believe, incorrect decision.

The need of uniformity of decision in this class of cases was adverted to by LACOMBE, *C. J.*, of the Second Circuit, in *The Loyal*, 204 Fed. Rep., 930, 933, where he said:

> "The Courts of Appeal in the First and Sixth Circuits [*Quinlan* v. *Pew*, 56 Fed. Rep., 111, and *Great Lakes Towing Co.* v. *Mills Transp. Co.*, 155 Fed. Rep., 11] seem not to be in accord as to the interpretation of the section under consideration. The question is a close one. * * * It would seem desirable that some effort should be made to secure a construction of the act by the Supreme Court which will insure future uniformity of decision."

FIFTH: In addition to the question of limitation of liability above stated, this case contains a further question which even by itself would justify the issuance of a writ of certiorari. That question arises from clause 9 of the bills of lading issued by the Insular Line, but equally available to your petitioners as owners and claimants of the vessel, which provided that

> "In case of any loss, detriment or damage done to or sustained by said goods, or any part thereof, for which the carrier shall be liable to the shipper, the owner, or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods." (Record, fol. 1022.)

It was proved that payments had been made by the underwriters to the shippers, the receipts for which, however, designated the payments as loans and not as insurance. But they were loans which were not to be repaid unless, and only to the extent that, the shipper should recover from the carrier. With respect to this, District Judge HOUGH said (Record, fol. 1087):

> "To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient, is a 'loan'—insults understanding."

The District Judge felt bound, however, to follow the decisions of the Circuit Court of Appeals for the Second Circuit in *Pennsylvania Railroad Co. v. Burr*, 130 Fed. Rep., 847, and *Bradley v. Lehigh Valley R. R. Co.*, 153 Fed. Rep., 350, which upheld devices whereby the decision of this Court in *Phoenix Ins. Co. v. Erie & Western Tr. Co.*, 117 U. S., 312, was deprived of all efficacy. The *Phoenix* case held that the carrier was entitled to the benefit of insurance under a bill of lading clause such as that above quoted.

The importance to shipping and commercial interests of a correct decision of the question whether a carrier shall still be held entitled under this Court's decision in the *Phoenix* case to the benefit of insurance covering damage for which it may be

liable, notwithstanding the various devices insurance companies have, so far, successfully interposed to defeat such right, can hardly be overestimated. As Judge HOUGH said (Record, fol. 1083):

> "The foregoing lengthy statement can be justified only by a desire that this case be taken further and some settlement reached in a matter wherein the fictions and subterfuges of the law would excite the admiration of a casual ejector."

## Statement and Proceedings in the District Court and Circuit Court of Appeals.

Your petitioners chartered their steamship *Julia Luckenbach* to the Insular Line by time charter party dated October 25, 1910, for three years and seven months from May 31, 1911, the charter party being signed by Edgar F. Luckenbach in behalf of himself and the other owners. It provided that the vessel should be on delivery "tight, staunch, strong and in every way fitted for the service," and contained a covenant by the owners to "maintain her in a thoroughly efficient state in hull and machinery for and during the service" (Record, fols. 1032, 1034).

On June 3, 1912, a libel was filed in the District Court for the Southern District of New York by the W. J. McCahan Sugar Refining Company against the *Julia Luckenbach in rem* and against the Insular Line, charterer, *in personam*, to recover damages sustained by a cargo of sugar being transported from San Juan, Porto Rico, to Philadelphia, in April, 1912. Sea water had entered through a hole in a plate on the starboard side, strake B,

which was very nearly one and three-quarters by seven-eighths of an inch. The District Court found that at the edges of the hole the original half-inch of iron had worn to a knife edge, and that the plate in the immediate neighborhood was much decayed (Record, fol. 1065). The Insular Line made your petitioners parties under Rule 59 in order that they might respond for so much of the loss as should exceed the agreed value of the steamer and her pending freight. Both your petitioners and the Insular Line defended on the ground that due diligence had been used to make the vessel seaworthy, and your petitioners further contended that the damage resulted either from perils of the sea or from damage to the vessel's bottom, resulting from being given an improper loading berth at San Juan by the Insular Line.

On the trial the District Court found that the damage resulted from corrosion of the plate by a mixture of sugar and salt water (Record, p. 357). Both your petitioners and the Insular Line invoked the protection of a clause in the bills of lading giving the carrier the benefit of shippers' insurance. The cargo had been insured under policies relieving the underwriters from liability if bills of lading should be taken in this form, but when the policies were issued assurances were given that these provisions would never be enforced to the detriment of the insured, and the underwriters have in fact reimbursed the W. J McCahan Sugar Refining Company for its loss. Receipts were taken for each payment designating the same as a loan and not insurance; a loan never to be repaid, however, unless, and only to the extent that, the shipper should recover from the carrier. The insured also agreed in the receipts to prosecute an action for the dam-

age in its own name, but only as requested by the underwriter and at the latter's expense.

The contention that these sham loans were in reality payments of insurance was rejected by the District Court with undisguised reluctance. "It has been solemnly held in this Circuit," Judge HOUGH said, "that whatever the payment is called, whatever label is put on it, controls. * * * What (the Insurance Company) can never recover is consistently called a 'loan'—and at present this seems enough to make it a loan for legal purposes." (Record, fol. 1090.)

An interlocutory decree was accordingly entered, directing that the libellant recover the full amount of its loss from your petitioners, and any balance, if execution should fail, from the Insular Line. Your petitioners thereupon moved for limitation of their liability to the value of the vessel and her pending freight as prayed for in their answer, and this motion was granted (Record, fol. 1192). Judge HOUGH said (Record, fol. 1168):

> "It has been affirmatively shown that the owners of the *Julia Luckenbach* were not privy to, nor had they knowledge of her unseaworthiness."
>
> * * * * * *
>
> "They failed to use due diligence in keeping their vessel seaworthy, because the competent men whom they employed to supervise and inspect the steamer so failed—within the stringent rules laid down by the courts. Perhaps it is more accurate to say that their own diligence was unavailing—under the law."

As to the right of the owners to limit liability in view of the decision in the *Bonner Line* case, Judge HOUGH said (Record, fols. 1187-1191):

> "There could not be a better example of the extraordinary nature of the rule contended for [represented by the *Benner Line* case] than is afforded by the facts herein. * * * If one accepts, therefore, the doctrine that a shipowner who charters a vessel unseaworthy at the commencement of the hiring period is liable without limitation, it is not necessary to hold that the ordinary form of time charter here before the Court contains an implied warranty of seaworthiness extending through the whole period of chartering."

On November 25, 1914, a final decree was entered in the libellant's favor for $100,774.87, of which $76,709.22, representing the value of the vessel, plus her pending freight, with interest and costs, was to be paid by your petitioners in the first instance, and the remainder by the charterer (Record, pp. 401-402).

Your petitioners appealed to the Circuit Court of Appeals and assigned error to the findings that the damage was caused by unseaworthiness and not by an obstruction in the berth furnished by the Insular Line, and that they had not exercised due diligence so as to be relieved from responsibility under the Harter Act; and also assigned error to the District Court's denial of the benefit of shipper's insurance. The Insular Line also appealed, assigning error to the finding that due diligence had not been exercised to make the ship seaworthy, to the allowance of limitation of liability to your petitioners and to the denial of the benefit of insurance.

The Circuit Court of Appeals affirmed the District Court in its findings of fact and its ruling on the question of insurance, but held that your petitioners were not entitled to limit their liability and reversed this portion of the decree. Without ex-

pressing any dissent from the finding that your petitioners were free from privity or knowledge as to unseaworthiness, and without making any comment on the extremely lucid and convincing opinion of Judge HOUGH as to limitation of liability (Record, pp. 387-398), the Court said, *per curiam* (Record, p. 419):

> "As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the *Benner Line,* 217 Fed. Rep., 497, holds that the owner cannot limit his liability against this express contract."

## Questions Presented for Consideration of This Court.

1. Under a time charter party, signed by the owner, which contains the usual provision as to fitness of the vessel upon delivery to the charterer, and which contains the usual provision that the vessel shall be maintained by the owner in an efficient state for and during the service, and which makes no reference to the limited liability statutes, may the owner limit his liability to the value of the vessel and pending freight under the limited liability statutes, or must he be denied the benefit of those statutes on the ground that the liability arises upon his personal contract, where the damage is caused by unseaworthiness developing without his privity or knowledge nearly a year after the vessel has been delivered to the charterer and after she has made several voyages under the charter?

The District Court answered that limitation of liability should be granted, and the Circuit Court of Appeals that it should be denied.

2. Is a shipowner entitled to the enforcement of a clause in the bills of lading under which cargo is carried providing that for all damage for which it may be liable the carrier shall have the benefit of the shippers' insurance when the underwriters have made payments to the shippers on account of the damage, which, however, are designated as loans, under policies purporting to relieve them from responsibility if the shippers accept such bills of lading?

Both the District Court and the Circuit Court of Appeals answered this question in the negative, the District Court reluctantly, on the authority of earlier decisions of the Circuit Court of Appeals.

In addition, there is a question whether the courts below were correct in deciding that the owners had not exercised "due diligence" to make the vessel seaworthy within the meaning of the Act of February 13, 1893, known as the Harter Act.

Your petitioners will present in connection with this petition a brief discussing more fully the contentions above stated, with citation of authorities.

WHEREFORE, your petitioners pray that this Honorable Court will cause a writ of certiorari to be issued requiring the United States Circuit Court of Appeals for the Second Circuit to certify the whole of the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioners will ever pray.

EDGAR F. LUCKENBACH and others,
Petitioners,

By PETER S. CARTER,
Proctor.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

PETER S. CARTER, being duly sworn, says that he is one of the proctors for the petitioners, Edgar F. Luckenbach and others, herein; that he has read the foregoing petition, and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

PETER S. CARTER.

Sworn to before me this
19th day of October, 1916.

R. H. WHITTEMORE,
Notary Public,
New York Co.
Certificate filed in Kings Co.
(Notarial Seal.)

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

CHARLES C. BURLINGHAM.

Dated, New York, October 19, 1916.

*Sirs:*

PLEASE TAKE NOTICE that the foregoing petition for a writ of certiorari will be presented to the Supreme Court of the United States on Monday, October 30, 1916.

Dated, New York, October 19, 1916.

PETER S. CARTER,
Proctor for Petitioners.

To

Messrs. KNEELAND, HARISON & HEWITT,
Proctors for W. J. McCahan
Sugar Refining Company.

Messrs. KIRLIN, WOOLSEY & HICKOX,
Proctors for the Insular Line.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

EDGAR F. LUCKENBACH
and others
(Claimants-Respondents-
Appellants)
Petitioners,

against

W. J. MCCAHAN SUGAR REFINING COMPANY,
(Libellant-Appellee)
Respondent,

and

THE INSULAR LINE
(Respondent-Appellant)
Respondent.

## BRIEF FOR PETITIONERS.

### FIRST POINT

**The Circuit Court of Appeals erred in holding that the petitioners could not limit their liability under R. S., Section 4283, and the Act of June 26, 1884, because the damage resulted from the breach of a personal contract contained in the charter party, as there was no personal contract in force at the time of the damage.**

The charter party of the *Julia Luckenbach* contained the ordinary provision that the vessel should be "on her delivery tight, staunch, strong and in every way fitted for the voyage," and also the so-called maintenance clause that the owners should "maintain her in a thoroughly efficient state in hull and machinery for and during the service." The vessel was chartered for three years and seven months.

The obligation as to seaworthiness was broken, if at all, at the time when the vessel was turned over to the charterers. By its terms it refers only to her condition "on her delivery," and there can be no liability thereunder for damage from unseaworthiness developing later.

In *Union Ins. Co.* v. *Smith*, 124 U. S., 405, 427, Justice BLATCHFORD said:

> "In the insurance of a vessel by a time policy the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk."

The scope of this rule is not limited to the law of insurance.

It follows that there was no breach of this warranty unless the defect which caused the damage was in existence at the time the *Julia Luckenbach* was delivered. Before disaster overtook her, she had been under charter for more than a year, during which several voyages had been made. On the uncontroverted evidence the loss was due to the corrosion of a plate by a mixture of salt water and sugar; but the charterer could offer no evidence that this process had begun before it received the vessel. The Trial Judge's finding that the warranty had not been broken was not disturbed by the Circuit

Court of Appeals. Judge HOUGH said (Record, fol. 1192):

> "At the time of voyage begun, therefore, the warranty of seaworthiness of the *Julia Luckenbach* had (as between the charterer and the owners) been exhausted."

This distinguishes the case at the outset from *Benner Line* v. *Pendleton*, where the loss was held due to unseaworthiness existing when the vessel was delivered under the charter. It remains to consider whether there was a breach of any other personal contract so that the doctrine of that case is still applicable.

The maintenance clause, found in all ordinary forms of charter parties, is a covenant by the owner to "maintain her [the steamer] in a thoroughly efficient state in hull and machinery for and during the service." This was interpreted by the Circuit Court of Appeals, incorrectly as we contend, as a continuing warranty of seaworthiness persisting throughout the three years and seven months of the charter party.

The District Judge said (Record, fol. 1188):

> "It is right—and has never been doubted—that the owner who time charters his vessel thereby binds his vessel to whatever lawful freight the charterers put in her, and for the safe transportation and delivery of that freight he should hazard his vessel. But to bind himself to an unlimited liability by such charter party for a period of years is a most extreme contention—and (accepting the Benner Line decision at full value) it depends solely on the meaning to be given to the language of the maintenance clause.
>
> "In a case where the demand of the charterers was far less extreme than that here

propounded, this question has been considered.

"In *Giertsen* v. *Turnbull* (Sessions Cases 1907-1908, page 1101) it was held that a series of voyages under time charter did not come within the stages-of-voyage doctrine of *The Vortigern* [1898] Pr., 140, and also that in a time charter 'the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including, of course, the expense of all necessary repairs.'

"The doctrine of this case has been received without comment or objection by Messrs. Scrutton and Carver."

The Circuit Court of Appeals cited no authority to the contrary.

The contract contained in the maintenance clause of the charter party of the *Julia Luckenbach* was very different from those "personal contracts" with respect to which limitation of liability has in many cases properly been denied. See *Great Lakes Towing Co.* v. *Mills Transpt. Co.*, 155 Fed. Rep., 11; *The Amos D. Carver*, 35 Fed. Rep., 665; *Laverty* v. *Clausen*, 40 Fed. Rep., 542; *Gokey* v. *Fort*, 44 Fed. Rep., 364. The decisions referred to show that a "personal contract" is one to be performed by the owner, entirely irrespective of the vessel. It is undoubtedly true that a contract signed by the owner is his personal contract, but it does not follow that every contract he signs deprives him of the right to limit liability. Judge Hough said (Record, fol. 1172):

> "Every case cited, or to be found before the Great Lakes Towing Company decision, and laying down the doctrine that a shipowner cannot limit for his own contract, shows the same kind of contract, viz.: An agreement to pay money in such wise that an action in debt or *assumpsit* would have laid therefor."

If signing by the owner should be established to be the test of such a personal contract as would defeat the right to limitation of liability, then an owner who should be astute enough to have the charter party signed by the master, or by an office boy, could limit liability, notwithstanding unseaworthiness at the beginning of the voyage, if that was without his privity or knowledge. If he should himself sign the charter party, he could not limit liability under such circumstances. We cannot believe that the right to limit liability depends on the accident of who signs the charter. If we are correct in this, the right to limitation depends on the nature of the contract. If it is a contract on account of the ship and to be performed by the ship (as this charter party with the Insular Line was), and the liability arises out of the prosecution of the business of the ship (as this liability did), the owner may always limit liability if free from privity or knowledge.

## SECOND POINT.

**The limited liability act by its express terms covers every case where the damage occurs without the privity or knowledge of the owner.**

The Act of March 3, 1851, now Revised Statutes, Section 4283 (quoted on p. 1 of the Petition) provides that the liability "shall in no case exceed" the owner's interest in the vessel and pending freight. Also the Act of June 26, 1884, Section 18 (quoted on p. 1 of the Petition), provides that the aggregate liabilities of all the owners of a vessel "shall not exceed" the value of such vessel and pending freight.

This language is conclusive, and if the statute is to be applied at all it must be applied to every case where the loss happens without the privity or knowledge of the owner. There is no principle of statutory construction which will justify the exclusion of specific cases from the operation of a general statute. In *The Employers' Liability Cases*, 207 U. S., 463, 500, it was sought, but unsuccessfully, to read qualifying words into an act of Congress. Ever since the decision of Mr. Justice BRADLEY in *Norwich Co.* v. *Wright*, 13 Wall., 104, the statute has until now been liberally construed. In *United States* v. *Hamburg-Amerikanische, etc.*, 212 Fed. Rep., 40, 44, ROGERS, *C. J.*, said for the Circuit Court of Appeals for the Second Circuit.

> "The public benefit which was to be derived from the upbuilding of the shipping interests was the purpose of the act and the only proper justification for its enactment. It is most important that this fact be kept in mind in any attempt to construe the law."

In *Richardson* v. *Harmon*, 222 U. S., 96, referred to in *The San Pedro*, 223 U. S., 365, 376, this Court decided that the limited liability act now includes any and all debts and liabilities of the owner on account of the ship incurred without his privity or knowledge. See also *O'Brien* v. *Miller*, 168 U. S., 287.

Concededly the owners of the *Julia Luckenbach* were free from privity or knowledge. They employed a competent port captain and port engineer to inspect the vessel, and in addition the ship had been carefully inspected by several surveyors for underwriters. The hole in the lower plate of the vessel was a latent defect, was not discoverable by the exercise of ordinary care, and was not discovered by the skilled persons employed by the owners. Judge HOUGH said (Record, fol. 1168):

> "It has been affirmatively shown that the owners of the *Julia Luckenbach* were not privy to nor had they knowledge of her unseaworthiness."

The Circuit Court of Appeals made no comment on this finding. It is evident, therefore, that the petitioners were entitled to limitation of liability except for the qualification of their right asserted by the Circuit Court of Appeals on the theory that they had made a personal contract, which, as we have sought to show in the preceding point, was not in existence at the time of the damage.

It is important to understand clearly the meaning of privity or knowledge. We believe that "knowledge" is a conscious knowledge of something causing the loss with respect to which the shipowner has a duty; and that "privity" is a negligent failure to use this conscious knowledge to prevent

the loss. In other words, "privity or knowledge" means some personal concurrence of the owner in the accident or the circumstances which created the loss. See *Lord* v. *Goodall etc. S. S. Co.*, 4 Sawy., 292, Fed. Cas. No. 8506, at page 887. Privity is not the same as neglect, and for any neglect to be privity it must have been directly participated in by the owner. *Craig* v. *Continental Ins. Co.*, 141 U. S., 638, 646. The fact that a ship may be unseaworthy does not fix the owner with privity or knowledge. In *Quinlan* v. *Pew*, 56 Fed. Rep., 111, 118, PUTNAM, *C. J.*, said:

> "We are also constrained to the belief that this statute, which the Supreme Court directs shall be interpreted broadly, has regard for the usual necessities of the occupations of life, and in that respect intends that the owners may avail themselves of the proper facilities common to business men, and be relieved, so far as it is concerned, whenever and so far as they have appointed a suitable representative, be he master, consignee, or other agent, to supervise the ship, either at sea or at the home port, or otherwise, and either for fitting her away, or navigating her after she is fitted away."

In *Boston Marine Ins. Co.* v. *Metropolitan Redwood Co.*, 197 Fed. Rep., 703, 709, the Circuit Court of Appeals for the Ninth Circuit said:

> "But we cannot concede that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, machinery or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge, and our atten-

> tion has been directed to no authority which so holds."

See also:

> *The Tommy*, 151 Fed. Rep., 570.
> *The Annie Faxon*, 75 Fed. Rep., 312.
> *The Republic*, 61 Fed. Rep., 109.
> *The Colima*, 82 Fed. Rep., 665.
> *Van Eyken* v. *Erie R. R. Co.*, 117 Fed. Rep., 712.

The effect of the authorities is that the shipowner must be held free from privity or knowledge and therefore entitled to limit liability, notwithstanding negligence, notwithstanding his entire ignorance of his ship and its operation, and notwithstanding unseaworthiness even, provided he has placed the building, inspection or navigation in the hands of competent agents, unless with conscious knowledge of the effect of his own action or inaction he has directly participated in the act causing the loss or has failed to take effective steps within his power to prevent it.

## THIRD POINT.

### The application by the Circuit Court of Appeals of the "personal contract" doctrine frustrates the purpose of the limited liability act.

The purpose of the limited liability act was stated in *Great Lakes Towing Co.* v. *Mills Transpt. Co.*, 155 Fed., 11, 17, as follows:

> "The purpose of Congress was, as we think, to relieve the shipowner from the con-

> sequences of those extraordinary risks which were imposed without limitation by the law of the admiralty as that law has been interpreted in this country."

The nature of the enterprise requires that the performance of the shipowner's exacting obligations be frequently confided to agents. If one of these trusted deputies could by error or dereliction bring utter ruin to his employer, that would be a serious deterrent to the prosecution of the industry. The maritime nations have accordingly for centuries permitted the owners of vessels to limit their liability for damage occurring without their privity or knowledge to the funds invested in the enterprise.

The reasoning of the Court below seemingly is that if an owner chooses to contract himself into duties beyond those imposed by law he renounces his claim to the exemption which the law expressly permits. In testing this argument it must be assumed that Congress intended a substantial benefit to the industry. But nearly all of the shipowner's obligations are embodied in contracts which, under this doctrine, would be removed from the beneficent operation of the statutes. It follows that the qualification made by the Circuit Court of Appeals will make the supposed benefit of the statutes negligible and delusive. The argument in favor of excluding contractual duties from the operation of the limitation statutes was conclusively answered by Judge PUTNAM, speaking for the Circuit Court of Appeals for the First Circuit, in *Quinlan* v. *Pew*, 56 Fed. Rep., 111, 119:

> "Neither can the proposition of the appellant be maintained that the statute does not apply because there was in this case a personal contract on the part of the owners, either express or in the form of an implied

> warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerated as to those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped. That there may be certain contracts, relating not so much to navigation of the ship as to fitting her to sea, by which the owners charge personally their own credit, and which do not come within the statute, may well be contended without at all touching the principles here involved."

If Congress intended these acts to relieve against excessive liability from obligations which must be performed vicariously, the personal contract doctrine defeats rather than furthers that intent. The courts which have applied it, in order to determine whether the owner may limit his liability, look at the source of his duty. But if the duty can be performed only by deputy, it should be immaterial whether it originated in the owner's contract or was imposed upon him by law. An agent is as likely to commit a breach of contract as to commit a tort. The *performance* should be the focus of attention. If a statute designed to foster the industry by express language exempted a shipowner's general property from liability for an agent's tort, but not for an agent's breach of contract, it would be called a curious freak of legislative inconsistency. It is respectfully submitted that the Court below by its qualification of an unambiguous statute has attained precisely this result.

Matters covered by the maintenance clause of a charter party are as frequently beyond, as within,

the control of the owner. On a voyage under a time charter the ship may fall in need of repairs and on arrival at a port where it is practicable to repair the master may neglect entirely to make repairs or to advise the owner of their necessity. Can it reasonably be contended that in such a case the owner is deprived of his right to limit liability?

To carry the argument a step further, a ship may become unseaworthy in the course of her voyage when it is utterly impossible to make repairs before reaching port. If the maintenance clause be strictly construed and the personal contract doctrine asserted by the Circuit Court of Appeals be applied, the owner may not limit liability. Such a conclusion demonstrates the absurdity of the proposition. The case just put is not imaginary. In *The Burma,* 187 Fed. Rep., 94, the Circuit Court of Appeals for the Second Circuit held that the maintenance clause was broken when the vessel's machinery was disabled or rendered inefficient during the voyage by reason of the inability of the engineers to use properly the coal furnished by the charterers. In that case the engineers were beyond the control of the owner, and the breach was without his privity or knowledge. We cannot bring ourselves to doubt that limitation of liability should be granted in such a case.

But if limitation is granted in such a case it is because the owner is free from privity or knowledge. Why, then, should it not be granted in every other case under the maintenance clause where the owner is free from privity or knowledge? The words of the clause must be given the same effect under all circumstances, and their meaning cannot be altered by the accident that on one occasion the ship is at sea when the clause is broken by the engineers or crew, and on another occasion may be in port when the

clause is broken by a competent surveyor or port captain failing to discover what may several months later turn out to be a cause of unseaworthiness. As the District Judge clearly pointed out (Record, p. 393), the shipowner must perform his contract by deputy, whether for the actual navigation or for putting and keeping the ship in condition for navigation, and the same rules as to limitation of liability should apply in each case. If it should be desired to defeat the beneficent operation of the limited liability statutes, that could be brought about in every case by the application of the "personal contract" doctrine, because ships do not move and no service is performed with or by means of ships except by virtue of some contract or agreement on the part of the shipowner.

## FOURTH POINT.

### The Circuit Court of Appeals erred in holding that the carrier was not entitled to the benefit of the insurance paid by the underwriters to the respondents.

The sugar was shipped on the *Julia Luckenbach* under bills of lading, clause 9 of which provided:

> "In case of any loss, detriment or damage done to or sustained by said goods, or any part thereof, for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods." (Record, fol. 1021.)

A provision in all respects similar to this came before this Court in *Phoenix Ins. Co.* v. *Erie*

*& Western Transpt. Co.*, 117 U. S., 312. That was a libel against the carrier by the insurance company which had insured goods shipped under bills of lading containing the above clause and had paid a loss for which the carrier was liable. It was held that the clause was valid to prevent a recovery by the shipper, and that the subrogated insurer was likewise bound. The question is whether the payments which the W. J. McCahan Sugar Refining Company received from its insurers may properly be regarded as insurance.

The policies insuring the cargo contained in various forms warranties or provisions relieving the insurer from liability in case bills of lading were accepted agreeing that the carrier should have the benefit of insurance. But the underwriters elected not to stand upon these, and probably they would not have been a defense. Judge HOUGH in the District Court said with reference to the insurer's liability (Record, fol. 1085):

> "This record contains proof that when a shipper gets insurance he (or his broker) knows that by the policy he pays for he is left (*pro tanto*) without insurance whenever he accepts a bill of lading requiring him to give the carrier the benefit of his contract. But he is contemporaneously assured that by a gentleman's agreement, paid for by his premiums, he will receive against usual proofs of loss the amount he would have gotten had there been no bill of lading, that he will never be called on to pay back any of the money, and that as far as he is concerned his insurance protection is as absolute as though one clause in the policy did not exist, because he is assured beforehand that in consideration of his premium the solemn warranty will not be practically enforced.

> To say that a man in this condition is not insured, is nonsense—any insurance company that refused to make the so-called 'loan' could be successfully sued—the complaint sounding in fraud and deceit.
>
> Indeed recourse need not be had to a pleading in tort—for the real contract is not expressed in policy and riders. The actual and enforcible agreement is to pay the loss provided it be always called a 'loan.' "

The insurers have kept their oral agreements by paying the respondents the full amount of their loss. But the written receipts which the insured were required to sign describe these sums as loans, not insurance, and bind the insured to bring suit against the carrier in his own name as requested by the insurer and at the insurer's expense. The "loan" is never to be repaid unless there is, and only to the extent of, a recovery against the carrier. If we penetrate the form to the substance of the transaction, we find in reality a payment of insurance. The insurers' right to demand repayment of the "loan" is merely their right of subrogation parading in disguise. The value of the two rights is the same: The amount recovered from the carrier. They depend upon the same condition: Liability of the carrier. The only distinction is in the name with which the rights are tagged. The opinion of the late Mr. Justice LURTON, then of the Tennessee Supreme Court, in *Lancaster Mills* v. *Merchants Cotton Press Co. et al.*, 89 Tenn., 1, 56-57, is apposite:

> "We are convinced that the transaction between the Insurance Company of North America and the complainants, and evidenced by this receipt, is in fact and law a payment and satisfaction of the loss sustained by the burning of this cotton."

In the words of the District Judge (Record, fol. 1087):

> "To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient, is a 'loan'—insults understanding."

The record contains the candid admission that this intricate machinery of warranties, oral contracts and loan receipts was devised for the express purpose of avoiding the decision of this Court in *Phoenix Insurance Co.* v. *Erie & Western*, *supra*. Judge HOUGH said (Record, fol. 1087):

> "Unless shams are loved for themselves they must be encouraged for a reason. Such reason exists here, there has always been a settled hostility to the *Erie & Western* case among the lower courts. * * * There has never been any desire to pierce through pretense to truth, and that which defeated the carrier's defense has been almost uniformly viewed with approval."

## CONCLUSION

**It is respectfully submitted that the writ of certiorari should be granted.**

PETER S. CARTER,
Proctor for Petitioners.

CHARLES C. BURLINGHAM,
Of Counsel.

October 19, 1916.

Service of the foregoing petition and brief is hereby admitted this 19th day of October, 1916.

Kneland, Harrison & Merrill

Proctors for W. J. McCahan Sugar Refining Company.

Kirlin, Morgan & Hickey

Proctors for the Insular Line.

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Office Supreme Court, U. S.
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 74[redacted]51

EDGAR F. LUCKENBACH, and others,
*(Claimants-Respondents-Appellants)*
*Petitioners,*

*against*

W. J. McCAHAN SUGAR REFINING COMPANY,
*(Libellant-Appellee)*
*Respondent,*

*and*

INSULAR LINE,
*(Respondent-Appellant)*
*Respondent.*

# BRIEF FOR RESPONDENT INSULAR LINE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. PARKER KIRLIN,
MARK W. MACLAY, Jr.,
*Counsel for Respondent Insular Line.*

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

| | |
|---|---|
| EDGAR F. LUCKENBACH, and others, (Claimants-Respondents-Appellants) Petitioners,<br><br>*against*<br><br>W. J. McCAHAN SUGAR REFINING COMPANY, (Libelant-Appellee) Respondent,<br><br>and<br><br>INSULAR LINE, (Respondent-Appellant) Respondent. | No. |

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondent opposes the petition for certiorari on the following grounds:

I.—THE PETITIONERS HAVE NOT BEEN DENIED THE BENEFIT OF THE LIMITATION OF LIABILITY STATUTES UNJUSTLY.

The petitioners base their application principally on the ground that the benefit of the Limitation of Liability Statutes has been denied to them, and that this Court has granted a writ of cer-

tiorari in the case of *Benner Line* v. *Pendleton*, 217 Fed. Rep., 497.

It is well settled that the shipowner is not entitled to the benefit of Limitation of Liability Statutes in respect of his personal contracts.

In the present case, the Insular Line chartered the Steamer *Luckenbach* from her owners for the period of three years, under a time charter, which contained a warranty that the ship was seaworthy at the inception of the voyage, and a covenant to maintain her in a seaworthy condition throughout the period of the service. *The charter was signed by one of the owners personally.*

The language of the undertakings was as follows:

The "Witnesseth Clause" of the charter party provides for the hiring of the vessel "being on her delivery tight, staunch, strong, and in every way fitted for the service." *Fol.* 1032.

Clause 1 provides "that the owner shall • • • maintain her in a thoroughly efficient state in hull and machinery for and during the service." *Fol.* 1034.

This covenant by the owners is inserted in a charter party of this kind because as the charter is not a demise and as the charterer is not owner *pro hac vice* he has not anything to do with the maintenance and repair of the vessel which are matters over which he has no control, yet he is liable without limitation to shippers whose cargo he contracts to carry, and therefore for his own protection he necessarily requires a covenant or agreement by the owners to maintain the vessel in a seaworthy condition throughout the service.

While engaged on a voyage under this charter, during which the Insular Line had contracted to carry a cargo for the W. J. McCahan Sugar Re-

fining Company, under bills of lading, one of the plates in the side of the ship near the bottom caved in, owing, as both courts below have found, to a gradual rusting away and disintegration of the plating, which left it too weak to resist the ordinary pressure of the sea.

Witnesses testified that this disintegration had been going on for an interval of probably 3 or 4 years. The ship narrowly escaped sinking before she could reach port, and a very heavy damage to cargo was caused.

In proceedings against the ship and the Insular Line as charterer to recover for this damage, the Insular Line filed a cross petition against the steamer, praying that it be adjudged entitled to indemnity from the shipowner who signed the charter party in respect of any judgment that might be entered against it in favor of libelant.

The District Court held that the charterer was entitled to indemnity up to the value of the steamer, but adjudged that the owners of the steamer were entitled to a limitation of their liability, both as against the shipper and the charterer.

The Court of Appeals reversed this decision, holding that as one of the owners had personally signed the contract, the charterers were entitled by reason of the breach of his personal covenant of seaworthiness, to indemnity from him up to the full extent of the amount of the recovery by the libelant against the charterer.

This decision, it is submitted, was entirely in accordance with precedent, and just in principle.

The Court of Appeals cited its own opinion in *Benner Line* v. *Pendleton*, 217 Fed. 497, in support of its decision. This case is distinguishable from that case in principle.

The Benner Line in that case sued as bailee, that is, in a representative capacity, on behalf of the owners of cargo, who had made their shipments under bills of lading which had not contained an express warranty of seaworthiness. Their right, and the derivative right of the charterer, therefore, depended upon an implied warranty of seaworthiness, instead of an expressed warranty.

An implied warranty of seaworthiness is not a personal contract of the shipowners, but is an obligation imputed to them by law, and one on which in principle they should be entitled to a limitation of their liability.

It is open to doubt whether the charterer suing on a derivative right of the shippers was entitled to claim on behalf of the shippers that the personal warranty of seaworthiness which had been signed as between the owner and the charterer could be invoked to defeat the owners' right to limitation of liability as against a claim which in its essence was nothing more than a claim of shippers whose right of recovery was based upon the implied warranty of seaworthiness.

For these reasons the conclusion of the petitioners on pp. 4 and 5 of the petition, that if on the hearing of the writ in the Benner Line case this court should reverse that decision, these petitioners would be entitled to a reversal and that the case is in all important aspects so nearly identical with the Benner Line case that this court might well hear argument on both at the same time without confusion of the issues, is not justified. The distinctions above set forth are sufficient to make it highly desirable that the two cases should not be argued together.

II.—THE PRESENT CASE IS CLEARLY GOVERNED BY DECIDED CASES.

In the opinions of the Circuit Court of Appeals and of the District Court, and in the briefs of counsel, there appears to be but one case which suggests that the clause in question should be construed in any way but as a continuing warranty of seaworthiness, and that one case did not consider whether or not such a covenant was a personal contract of the owner.

*Giertsen* v. *Turnbull* (1907-1908), Sess. Cas., 1101, contains a dictum only to this effect, which is unsound in principle. In that case the sole controversy related to the length of time for which the charterers were entitled to make a deduction from hire on account of breakdown of machinery, and the responsibility for the cost of coals consumed during the period the vessel was off hire.

The dictum in question which was cited by the District Judge in this case in his opinion, *fol.* 1190, is that in a time charter:

"The implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including, of course, the expense of all necessary repairs."

Even in this extract it should be observed that the Court of Sessions held that the owners had the *burden,* as well as the *expense,* of maintaining the vessel during the period of the charter in a

thoroughly efficient state, and construing the maintenance clause most favorably to the owner the extract from *Giertsen* v. *Turnbull* does not relieve him from the burden as well as the expense of keeping the vessel seaworthy.

The question which the petitioners seek to have this court consider has been set at rest by a long series of cases in the Federal courts.

It is fundamental that the ship owner cannot escape liability for fulfillment of his own contract. *Richardson* v. *Harmon*, 222 U. S., 96, and cases cited. This principle was admitted by the District Judge in this case. *Opinion, fol.* 1171. The distinction between a contract on which the owner may limit his liability and one on which he cannot, depends on whether the contract is an imputed or personal liability.

The present case is one where the managing owner of the *Julia Luckenbach*, who was himself a large part owner, personally negotiated and signed a contract in which it is provided not only that the vessel should on her delivery be tight, staunch, seaworthy, etc., but also that she should be maintained so throughout the period of the charter party.

The general principle was established in the Second Circuit as early as 1888 in *The Amos D. Carver*, 35 Fed. 665, in which Judge Brown held that the limitation act of 1884 does not restrict owners' liability on their own personal contracts, but only on account of the vessel. "That is, the liability that is imposed upon them by law in consequence of their ownership of the vessel, viz: for the contracts or acts of the ship or her master, without the owners' express intervention." P. 669.

The *Amos D. Carver* has been cited with approval by this court in *Richardson* v. *Harmon*, 222 U. S. 96, 106.

The more recent cases of *The Loyal*, 204 Fed. 930, and *Benner Line* v. *Pendleton*, 217 Fed. 497, were based on principles set forth in the carefully considered opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company*, 155 Fed. 11. In that case the contract in question was accepted and signed by the managing owner of a number of vessels named which were the vessels to which the contract was to apply. The Circuit Court of Appeals reversed the District Court's decree of limitation and held that the contract of the managing owner was the actual contract of the owner.

After explaining the purpose of limitation acts at p. 16 of the opinion, the Circuit Court of Appeals took the position that the limitation statutes restored the old rule of the maritime law of the commercial nations of Europe which limited liability to the value of ship and freight earned when the liability of the owner has occurred without his own participation in the cause *or creation* of the liability.

The Great Lakes Towing Company case is direct authority for the proposition that a contract made by the managing owner of a number of vessels is a personal contract of the shipowner, provided such managing owner has the authority to make such a contract. That contract was signed in almost exactly the same form as the charter party of the *Julia Luckenbach*. It seems, therefore, that on the question of limitation the present case is within the doctrine of the Great Lakes Towing Company case.

In *Great Lakes Towing Company* v. *Mills Transportation Company* an application for certiorari to this court was denied. 207 U. S. 596. For the same reasons certiorari should be denied in this case.

Furthermore, the Great Lakes Towing Company case was cited with approval by this court in *Richardson* v. *Harmon,* 222 U. S. 96, at p. 106. A particularly significant circumstance in connection with this citation in *Richardson* v. *Harmon* is that the opinion of this court was written by Mr. Justice Lurton who, as one of the judges of the Circuit Court of Appeals for the Sixth Circuit, took part in the decision of the Great Lakes Towing Company case. That Mr. Justice Lurton had in mind not only the decision but also the principles involved in the Great Lakes Towing Company case is shown by the following extract from his opinion, p. 106, which follows immediately after the sentence in which the Great Lakes Towing Company case is quoted:

"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect *and contracts.*" (Italics ours.)

Regardless of the later cases of *The Loyal,* 204 Fed. 930, and *Benner Line* v. *Pendleton,* 217 Fed. 497, it appears that the question in regard to limitation of liability raised in this case has already virtually been determined by this court in accordance with the decision of the Circuit Court of Appeals for the Second Circuit.

III.—PETITIONERS' CONTENTION THAT THERE IS A CONFLICT IN THE LAW OF THE SEVERAL CIRCUITS IS UNSOUND.

The only question presented in this case is whether or not a shipowner, who has himself signed an express written contract to make a vessel seaworthy and maintain her so, can limit his liability for his failure to comply with that contract.

*Quinlan* v. *Pew*, 56 Fed. 111, decided by the Circuit Court of Appeals for the First Circuit in 1893, on its facts does not have any bearing on the questions raised by the petition. In that case the owners of a schooner chartered her orally to the master and crew. Owing to chafing by a cracked bull's-eye, the jib sheet parted and injured one of the crew. The court held the owners were entitled to limitation of liability.

The case does not decide that an owner may limit his liability under a contract in which he has personally and specifically undertaken to make a vessel seaworthy and maintain her so during the period of contract. This question was reserved in a part of the opinion quoted at page 5 of the petition immediately following the italicised part of the extract. This language is found at page 120 and is as follows:

"That there may be certain contracts, relating not so much to the navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may be well contended, without at all touching the principles here involved."

See also the concurring opinion of Aldrich, *D. J.*, p. 122.

There is not any decision in any Circuit Court of Appeals contrary to the decision of the Circuit Court of Appeals for the Second Circuit in this case. Even if the decision in *The Loyal,* 204 Fed. 930, were in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Quinlan* v. *Pew,* 56 Fed. 111, as is suggested by Judge Lacombe's opinion in *The Loyal,* p. 933, and in the petition in this case, that circumstance does not have any bearing on the present case, because both *The Loyal* and *Quinlan* v. *Pew* had to do with implied warranty and not express covenants.

Again, in so far as the conflict between the First and Sixth Circuits referred to by Judge Lacombe in *The Loyal* may have existed at the time *The Loyal* was decided, the question was thereafter set at rest by the denial of the petition for certiorari by this court in *Great Lakes Towing Co.* v. *Mills Transportation Co.,* 207 U. S. 596, and the citation of the Great Lakes Towing Co. case with approval by this court later in *Richardson* v. *Harmon,* 222 U. S. 96, 106.

Wherefore, the respondent Insular Line prays that the petition be denied.

New York City, October 26th, 1916.

Respectfully submitted,

J. Parker Kirlin,
Mark W. Maclay, Jr.,
Counsel for
Respondent Insular Line.

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. [redacted]61

EDGAR F. LUCKENBACH AND OTHERS,
(Claimants-Respondents-Appellants),
Petitioners,

AGAINST

W. J. McCAHAN SUGAR REFINING COMPANY,
(Libellant-Appellee),
Respondent,

AND

INSULAR LINE,
(Respondent-Appellant),
Respondent.

BRIEF FOR PETITIONERS

PETER C. CARTER,
CHARLES C. BURLINGHAM,
Proctors for Petitioners.

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SIMON H. HOLMES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 299

EDGAR F. LUCKENBACH and others,
(Claimants-Respondents-Appellants)
Petitioners

AGAINST

W. J. MCCAHAN SUGAR REFINING COMPANY,
(Libellant-Appellee)
Respondent

and

INSULAR LINE,
(Respondent-Appellant)
Respondent

## BRIEF FOR PETITIONERS

### STATEMENT

This is a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. The opinion of the Circuit Court of Appeals was *per curiam*, and is at page 276 of the Record. It is reported in 235

Fed. Rep. 388. The suit was in admiralty and was tried in the District Court for the Southern District of New York before Hough, *J.* His two opinions are at pages 240 and 260 of the Record, and are reported in 235 Fed. Rep. 388.

The suit involves the question of liability and limitation of liability of the petitioners for damages sustained by the owners of sugar shipped from Porto Rico to New York on the steamship *Julia Luckenbach* in May, 1912, due to sea water reaching the sugar through a hole in one of her lower hull plates.

The facts as to the happening of the damage and the relation of the parties are concisely stated in the opinion of the District Court (Record, pp. 240-241):

"For some years prior to April, 1912, the *Julia Luckenbach*, an iron steamer then about thirty years old, had carried sugar (during the season) between Porto Rico and Atlantic ports. In the month named she was under charter to the Insular Line and on and before April 25th had laden a partial cargo of sugar in San Juan harbor. At 2 A. M. of April 26th she left her pier and at 7 A. M. arrived at Arecibo, where she completed cargo by taking on additional sugar. At 8.30 P. M. of April 27th she left Arecibo (where she had lain offshore loading from lighters) and proceeded on her voyage to Philadelphia. She encountered strong winds and rough seas, so that the vessel rolled and pitched a good deal and shipped water in and over decks. She encountered that degree of strain to be expected in frequent Atlantic weather, and no more. It is not asserted that any injury received is due to peril of the sea,—in the legal sense of that phrase.

At 7.40 P. M. on April 28th, *i. e.*, after about twenty-four hours of rough weather, she was found to have seven feet of water in her after hold, and was thereafter with great difficulty kept afloat (the after hold being of unusual size), until refuge was found in San Juan

harbor. A hole was then discovered in a plate on her starboard side (strake B), very nearly, if not accurately 1¾ by ⅞ of an inch. At the edges of the hole the original half-inch of iron had worn to a knife edge; the plate in the immediate neighborhood was much decayed."

And also at pages 261-262:

"In May, 1912, the *Julia Luckenbach* was and had been since May 31, 1911, under charter to the Insular Line.

By that charter-party the steamer was to be placed at the disposal of the charterers on said May 31st, being then 'tight, staunch, strong and in every way fitted for the service'. The charter also contained the usual provision that the owner should 'maintain (the steamer) in a thoroughly efficient state in hull and machinery for and during the service'; and was signed 'Estate of Lewis Luckenbach, per Edgar F. Luckenbach, Trustee.' By the pleadings it is admitted that the Lewis Luckenbach estate did not own all the steamer, and that the charter-party was made by Mr. Edgar F. Luckenbach on behalf of all the owners. All the owners having been impleaded, have appeared and made the foregoing admission. The charter-party is therefore regarded as the contract of all the owners through their duly authorized agent and managing owner, Mr. Luckenbach.

The libellant shipped its sugar under a bill of lading issued by the Insular Line. It is admitted that under the findings of the Court heretofore made that bill of lading affords no defense to libellant's demand. It follows that since (as has been found) the loss complained of was caused by unseaworthiness of the *Luckenbach*, existing at the beginning of the voyage from Porto Rico to Philadelphia, the libellant must recover *in rem* up to the stipulated value of the vessel, and obtain the overplus from the Insular Line, which in turn has recourse against the impleaded owners of the steamer, unless said owners can obtain the limitation for which they now move."

## Proceedings in the Courts below

June 3, 1912, the W. J. McCahan Sugar Refining Company filed its libel in the District Court for the Southern District of New York against the steamship *Julia Luckenbach in rem* and against the Insular Line, charterer, *in personam*. The Insular Line made the petitioners, who were the owners of the steamer, parties under Rule 59 in Admiralty in order that they might respond for so much of the loss as should exceed the agreed value of the steamer and her pending freight. The petitioners had chartered the steamer to the Insular Line by time charter-party dated October 25, 1910, for 3 years and 7 months from May 31, 1911. The charter-party provided that the vessel should be on delivery "tight, staunch, strong and in every way fitted for the service", and contained the usual maintenance clause to "maintain her in a thoroughly efficient state in hull and machinery for and during the service".

The suit was defended both by the petitioners and the Insular Line on the ground that due diligence had been used to make the steamer seaworthy, as provided by the Harter Act (27 Stat. L. 445) and the bills of lading, and the petitioners contended that the damage resulted either from sea perils or from damage to the steamer's bottom, caused by the Insular Line giving her an improper loading berth at San Juan.

The petitioners and the Insular Line both defended on the further ground that they were entitled to the benefit of the insurance that had been effected upon the goods by virtue of the following clause in the bill of lading:

"In case of any loss, detriment or damage done to or sustained by said goods, or any part thereof, for which

the carrier shall be liable to the shipper, the owner, or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

The District Court found that the damage resulted from corrosion of the plate by a mixture of sugar and salt water, and held that the steamer was unseaworthy; also that, notwithstanding the diligence of the petitioners to keep the steamer repaired and fit for the service, due diligence had not been exercised.

Judge Hough said (Record, *262):

"They failed to use due diligence in keeping their vessel seaworthy, because the competent men whom they employed to supervise and inspect the steamer so failed—within the stringent rules laid down by the Courts. Perhaps it is more accurate to say that their own diligence was unavailing—under the law."

The District Court further held that since the cargo had been insured under policies which purported to relieve the underwriters from liability if the bills of lading gave the carrier the benefit of insurance, the defense based on the bill of lading clause above quoted was ineffectual, and that therefore the libellant could recover the full amount of its damages, which by the libel as amended were claimed to be $87,570.

The insurance provided by the insurance policies was paid by the underwriters under a so-called "loan receipt" which stated that the loan should not be repaid to the underwriters except to the extent that recovery should be made from the carrier.

The interlocutory decree entered provided that the libellant should recover the full amount of its loss from

*All references are to pages of the Record.

the petitioners and any balance, if execution should fail, from the Insular Line.

The petitioners thereupon moved for limitation of their liability to the value of the vessel and her pending freight, under Section 4283 R. S. and Section 18 of the Act of June 26, 1884, as prayed for in their answer, and limitation of liability was granted by the District Court. Judge Hough said (262):

"It has been affirmatively shown that the owners of the *Julia Luckenbach* were not privy to, nor had they knowledge of her unseaworthiness."

November 25, 1914, a final decree was entered for $100,774.87, of which $76,709.22, being the value of the steamer and pending freight, with interest and costs, was to be paid by the petitioners, and $24,155.65 by the Insular Line (268).

The petitioners appealed to the Circuit Court of Appeals and assigned error in the findings that the damage was caused by unseaworthiness and not by an obstruction in the berth furnished by the Insular Line, and that they had not exercised due diligence so as to be relieved from responsibility under the Harter Act; and also assigned error in the District Court's denial of the benefit of shipper's insurance.

The Insular Line also appealed, assigning error in the finding that due diligence had not been exercised to make the ship seaworthy, the allowance of limitation of liability to your petitioners and the denial of the benefit of insurance.

The Circuit Court of Appeals affirmed the District Court in its findings of fact and its ruling on the question

of insurance, but held that the petitioners were not entitled to limit their liability and reversed this portion of the decree. Without expressing any dissent from the finding that the petitioners were free from privity or knowledge as to unseaworthiness, and without making any comment on the extremely lucid and convincing opinion of Judge Hough as to limitation of liability, the Court said, *per curiam* (276):

"As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the *Benner Line*, 217 Fed. Rep. 497, holds that the owner cannot limit his liability against this express contract."

## Questions Presented

For the petitioners we shall argue

1. That the petitioners, if liable for the damage, are entitled, under the benefit of insurance clause in the bills of lading, to the benefit, to the extent of their liability, of the insurance moneys received by the libellant.

2. That the courts below erred in holding that the *Julia Luckenbach* was unseaworthy at the beginning of her voyage from San Juan April 25, 1912, or when she sailed from New York for Porto Rico April 13, 1912, and that due diligence to make her seaworthy had not been exercised.

3. That the petitioners are entitled to limit their liability to the value of the *Julia Luckenbach* and her pending freight notwithstanding the maintenance clause of the charter.

## FIRST POINT

THE PETITIONERS IF LIABLE FOR THE DAMAGE ARE ENTITLED UNDER THE BENEFIT OF INSURANCE CLAUSE IN THE BILLS OF LADING TO THE BENEFIT, TO THE EXTENT OF THEIR LIABILITY, OF THE INSURANCE MONEYS RECEIVED BY THE LIBELLANTS.

Clause 9 of the bills of lading provided (232):

"In case of any loss, detriment or damage done to or sustained by said goods, or any part thereof, for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

Although the bills of lading were issued by the Insular Line, they inured to the benefit of the ship, and the libellants claiming thereunder are, of course, bound by their terms, both as to the petitioners and as to the Insular Line.

A. THE PHŒNIX INSURANCE CO. CASE.

A bill of lading clause to precisely the same effect was upheld by this Court in *Phœnix Ins. Co.* v. *Erie & Western Transpt. Co.*, 117 U. S. 312. In that case the Insurance Company insuring the cargo had paid insurance to its owners. It was there held that the right of the Insurance Company against the Transportation Company, being a right of subrogation, was subject to all the restrictions of the contract between the carrier and the owner of the goods so far as valid, and the provision giving the carrier the benefit of insurance was held valid because the carrier might itself have insured against loss

irrespective of whether the loss should be caused by its own negligence. Mr. Justice Gray said, at page 325:

"As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation."

B. The Burr and Bradley cases in the Circuit Court of Appeals for the Second Circuit.

In the case at bar it has been held by both courts below that this clause does not now protect the carrier because of the terms of the cargo owner's insurance policies and of the so-called loan receipts which were taken by the Insurance Companies when the money was delivered, and because of the decisions of the Circuit Court of Appeals for the Second Circuit involving similar transactions, in *Pennsylvania R. Co.* v. *Burr*, 130 Fed. Rep. 847, and *Bradley* v. *Lehigh Valley R. Co.*, 153 Fed. Rep. 350.

We think the decisions in these two cases were incorrectly held to govern the case at bar, irrespective of whether those cases were correctly decided. In the *Burr* case it appears from the opinion of Lacombe, *C. J.* (130 Fed. Rep., at p. 850), that there were before the Court "only two written documents", and no other evidence bearing upon their construction. Also, in the *Bradley* case there was apparently nothing before the Court except

the insurance policy and the loan receipt, and the question was whether the Railroad Company's right of subrogation (as distinguished from the Insurance Company's right in the case at bar) was defeated. Wallace, *C. J.*, said (153 Fed. Rep., at p. 353):

"The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regard it as a payment of the loss in any sense."

C. The insurance payments were unconditional.

In this case we have complete evidence as to the intentions of the underwriters when the moneys were advanced. The effect of this evidence is such as to make the payments unconditional payments of insurance. See the testimony of Mr. Ogden, at pages 26-31 of the Record.

Before proceeding to this evidence we refer to the insurance documents. The policy of the Federal Insurance Company (the others are similar) recited (215):

"and warranted by the assured free from any liability for merchandise in the possession of any carrier, or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

The receipt delivered when the insurance money was advanced by the Federal Insurance Company (the others are similar) reads (220):

"New York, August 15, 1912.

Received from the Federal Insurance Company, Twenty-three hundred four and 16/100 dollars, as a loan and payable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on

S/s *Julia Luckenbach* from Porto Rico, Philadelphia, on or about 190 , or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company.

THE W. J. MCCAHAN SUGAR REFINING CO.,
R. S. POMEROY, Treasurer.

$2,304.16.
Description of property:—Sugar."

Mr. Ogden of the Federal Insurance Company testified that the loan receipt arrangement was outside the policy (28) and that at the time his Company advanced the money against this receipt it knew that the bill of lading provided for benefit of insurance to the carrier (29). It was intended that the amount advanced was an absolute payment unless the libellant should succeed in this suit, and the amount was the exact amount of the insurance and full payment of the loss (30). The Insurance Companies were admittedly liable if the carrier was not (28). The Insurance Companies retained and paid the proctors prosecuting the suit, and the suit is for their sole benefit (30-31), there being no repayment of their "loans" if this suit is unsuccessful (30). There was to be no further settlement or adjustment with the cargo owners, but these "loans" were intended as a final settlement.

D. THE WARRANTY IN THE INSURANCE POLICIES DID NOT PREVENT THE PAYMENTS BEING INSURANCE.

It may be that the cargo owners' acceptance of the bill of lading broke the warranty in the insurance policies and that the Insurance Companies could have refused to pay insurance; but it is clear that any breach of such warranty was waived, and equally clear that it was always intended to be waived. This waiver of the breach cannot convert into something other than insurance the money which the cargo owners received in return for their insurance premiums. So far as the carrier is concerned there need have been no insurance policies at all, and it matters not in what form or under what arrangement the money is paid the cargo owner, so long as it is in fact a payment to him for his own benefit.

Judge Hough in the District Court summarized the situation forcibly as follows (244-245):

"This record contains proof that when a shipper gets insurance he (or his broker) knows that by the policy he pays for, he is left (*pro tanto*) without insurance whenever he accepts a bill of lading requiring him to give the carrier the benefit of his contract, but he is contemporaneously assured that by a gentleman's agreement, paid for by his premiums, he will receive against usual proofs of loss, the amount he would have gotten had there been no bill of lading, that he will never be called on to pay back any of the money, and that as far as he is concerned his insurance protection is as absolute as though one clause in the policy did not exist because he is assured beforehand that in consideration of his premium that solemn warranty will not be practically enforced.

"To say that a man in this condition is not insured, is nonsense—any insurance company that refused to make the so-called 'loan' could be successfully sued,—the complaint sounding in fraud and deceit.

"Indeed recourse need not be had to a pleading in

tort,—for the real contract is not expressed in policy and riders. The actual and enforceable agreement is to pay the loss, provided it be always called a 'loan.'

"To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient is a 'loan',—insults understanding."

The only conclusion to be reached on the whole evidence is that there was an unconditional payment of insurance. This case is distinguished from *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128, by the fact that there settlement was postponed and no money paid until the carrier's liability should be determined. Here settlement was made by the Insurance Companies before the carrier's liability was determined, and with full knowledge of the carrier's rights under the bill of lading. If we penetrate through the form to the substance of the transaction we find that the Insurance Companies' right to demand repayment of the "loan" is merely their right of subrogation parading in disguise. The value of the two rights is the same: the amount received from the carrier. They depend upon the same condition: liability of the carrier. The only distinction is in the name given to the rights.

E. The insurance companies claiming through the shippers by subrogation are limited as the shippers would be limited.

The right of subrogation is limited by the provision that the carrier shall have the benefit of insurance. In *Wager* v. *Providence Ins. Co.*, 150 U. S. 99, at pages 108-109, Mr. Justice Shiras said:

"But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier,

is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312; *St. Louis, Iron Mountain, &c., Railway* v. *Commercial Union Insurance Co.*, 139 U. S. 223.

"If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier."

As between the cargo owner and the carrier, the latter is, by the bill of lading contract, entitled to the benefit of insurance. Perhaps this contract is broken by the cargo owner when he contracts with the Insurance Company to call the payments "loans", not insurance. But since the Insurance Company's right to recover against the carrier, whether in its own name or in the name of the cargo owner, is based on subrogation and is worked out through the rights of the cargo owner, the recovery of the Insurance Company is necessarily limited by the contract of the cargo owner irrespective of his attempted breach of his contract.

Since the Insurance Companies made their "loan" agreements with the cargo owners after they knew the latter were bound by contract with the carrier to give it the benefit of insurance, their rights are subordinate to

those of the carrier, by analogy with the rule in equity that a second assignee taking with notice of the rights of a prior assignee is postponed. See *Pomeroy's Equity Jurisprudence*, 3d ed., Secs. 713, 715. The situation is also similar to that presented by a prior equity, uniformly held to be a burden on the legal estate, of which Pomeroy says, Sec. 730:

"The doctrine is universally settled * * * that, among successive interests wholly equitable, and between an earlier equity and a subsequent legal estate, even when purchased for a valuable consideration, the one who acquires the subsequent estate or interest with notice of the earlier equity in favor of another person will hold his acquisition subject and subordinate to such outstanding interest or right; in the contest for priority between the two claimants he must be postponed; he takes his interest burdened with the obligation of recognizing, providing for, and carrying out the previous equity according to its nature."

In *Great Lakes and St. L. T. Co.* v. *Scranton Coal Co.*, 239 Fed. Rep. 603, 609, the purchaser of vessels who knew they were chartered and committed to the business of a third party was subordinated as owner to the third party's prior equitable right to specific performance of the charters.

F. The authorities hold that the so-called "loans" are payments of insurance.

Our contentions are supported by *Roos* v. *Philadelphia, Wilmington & Baltimore R. R. Co.*, 199 Pa. St. 378; *Lancaster Mills* v. *Merchants Cotton Press Co., et al.*, 89 Tenn. 1; and *Deming & Co.* v. *Merchants Cotton Press, etc., Co.*, 90 Tenn. 310.

In the *Roos* case the carrier's shipping receipt provided that in case of damage through negligence of its servants the carrier should have the full benefit of any insurance effected on the goods. The Insurance Company of North America insured the plaintiff for $2,000 against damage to the goods while in transit. After the goods were delivered damaged to the plaintiff she received $809.52 from the Insurance Company under a form of receipt which described this payment as a "loan" to be returned to the Insurance Company "when and to the same extent the same shall be recovered from the carrier." An action was thereafter brought against the carrier. The Court said at page 380:

"Under the contract the carrier was to have the benefit of any insurance effected on the property, and the plaintiff could not claim from the carrier and the insurance company a greater amount than the damage she really suffered. The learned trial judge instructed the jury, viz.: 'That was a lawful contract; the railroad company had a right to make the agreement, and if you are of the opinion that the insurance company paid $809 as an adjustment of the loss, but with a string to it, nevertheless it was a payment, and it ought to be deducted out of the $1,700, and the insurance company, which is in the business of taking risks like this, ought to be held. If you do not believe, however, that the insurance company's payment was an adjustment and the payment of a loss, but was a *bona fide* loan, outside and independent of any insurance matter, then it ought not to be deducted."

And at page 381:

"It was a significant fact that the amount paid was the exact sum total of her claim against the insurance company. The counsel of the insurance company was selected by the plaintiff to secure the whole loss from the carrier, and that company furnished witnesses to support her claim. If the carrier could be made to bear the whole burden, the insurance company would be

entirely relieved from the risk it assumed, and the stipulation in the insurance benefit clause in the shipping receipt would be rendered valueless to the carrier through an unfair combination of the owner and the insurance company, which would be manifestly unjust and unreasonable, as the contract provided that the carrier should pay a just assessment of the damage, and have full benefit of any insurance effected on the goods."

In the *Lancaster Mills* case the owner of cotton sued a warehouseman and a carrier to recover for the loss of cotton by fire. The warehouseman had failed to insure the goods as agreed. The owner had taken out insurance and received an advance from its insurers under a form of receipt substantially the same as the receipt in this case, which provided that the amount advanced should be returned if the carrier should be held liable. The question was whether this transaction was a loan or a payment. The Court held that it was a payment and that the owner could not recover from the defendants. Lurton, *J.*, said at page 57:

"We are convinced that the transaction between the Insurance Company of North America and the complainant, and evidenced by this receipt, is in fact and law a payment and satisfaction of the loss sustained by the burning of the cotton."

Exactly the same ruling was made in the *Deming* case which arose out of the same fire.

Although these two decisions did not involve a bill of lading clause giving benefit of insurance to the carrier, they squarely support the proposition that moneys advanced under loan receipts like those in the case at bar are payments and not loans. Since they are payments they are available to the petitioners and wholly extinguish their liability.

## SECOND POINT

THE COURTS BELOW ERRED IN HOLDING THAT THE JULIA LUCKENBACH WAS UNSEAWORTHY AT THE BEGINNING OF HER VOYAGE FROM SAN JUAN, APRIL 25, 1912, OR WHEN SHE SAILED FROM NEW YORK FOR PORTO RICO APRIL 13, 1912, AND THAT DUE DILIGENCE TO MAKE HER SEAWORTHY HAD NOT BEEN EXERCISED.

The petitioners recognize that where both courts below have reached the same decision on the facts this Court will not reverse the ruling unless clearly erroneous as a matter of law. The petitioners believe that within this rule they are entitled to a review of the facts of this case.

The defect in the plate was not susceptible of detection by any ordinary means. To visualize its location, see the diagram opposite page 214 of the Record. The hole was close to a frame between the floors of the vessel and close to the bilge keelson (91). It was in B strake on the starboard side, about 55 feet from the propeller post and about 7 feet from the keel on a straight line (91). It was between two intercostal keelsons about four or five feet apart, running fore and aft, and between two frames running athwart ship about 2 feet apart. It was covered over with cement, on top of which was the ceiling (175-176). Mr. Martin sounded a plate near the one in which the hole developed and upon its sounding hollow to him he suggested that the plate be drilled. Upon drilling he found the plate was half an inch thick. It was probably not possible to determine by hammering on the outside of the steamer whether the inside cement was loose or not. The practice of surveyors is not to

examine every space in the ship, but to examine a certain number of places and if the general condition is found to be good it is assumed that the rest of the steamer is equally so (91-92).

The *Julia Luckenbach* had been on drydock in January, 1912, after a collision with the steamer *Horatius*. Eleven surveyors visited here then (85-86), only about three months before the damage in suit.

The uncontradicted testimony of the master and officers is that when the steamer left New York, April 13, 1912, and on her voyage to Porto Rico, and while loading, and at San Juan and Arecibo, and up to April 28, 1912, about 6.40 P. M., while bound on her voyage to Philadelphia she was tight, staunch, sound and in every respect seaworthy. All known and customary tests and methods of examination to determine her seaworthy condition were employed from the time she left New York up to 4 P. M. April 28th. At 6.40 P. M. that day the leak was discovered.

Daniel Rodick, the master, testified that when the steamer left New York she was strong, staunch and seaworthy in all respects. During the voyage the carpenter sounded three times daily—8 A. M., noon and 4 P. M.—and reported to the master and the chief officer (127-128).

Chief officer Thomas Haley, who had been on the ship a year and a half, and previously two and one-half years, testified that when she left New York she was in first-class condition, and that the holds, limbers and strainers had been properly cleaned, and all steps taken to have the ship ready for loading cargo upon arrival at San Juan (157-158).

Chief Engineer Christian Knudsen explained the method for ascertaining the condition of the vessel before loading (101-102).

First Assistant Engineer George A. Little, who had been on the ship three years and six months and was familiar with the suction pipes, rose boxes and strainers, said upon leaving New York they were in first-class condition and were sufficient, as were also the pumps. At San Juan the flooring was taken up around the strainers, and the piping, rose boxes and strainers were found all right (182).

The libellant's witness Captain Bagger said that the end of one of the suction pipes had ropes or matting around it (34), and that one of the rose boxes or strainers was separated (37-38), but that was a condition that existed at New York after the damaged cargo had been discharged at Philadelphia, and was explained by the petitioners' superintending engineer, Worke (78).

The suction pipes and rose boxes were in good condition from the time the vessel left New York until the leak was discovered, and thereafter during the return to San Juan, except at certain intervals when the pipes got choked by molasses and bagging. Chief Officer Knudsen testified that two pumps were kept going on the after hold and shaft alley all night, that the pumps were tried on the bilges and at times got clogged up with sugar (102, 104, 125-126).

Chief Officer Haley said that there was no trouble with the pumps at the time of the leak, that the rose boxes and strainers were in perfect order and that the pumps

worked all right except that they occasionally clogged up with sugar (162-163).

The cement was in good condition within a short distance of the hole in the plate and near the hole it was broken up when examined after the accident (Knudsen, 106; 123-125; Rodick, 134-135; 151-152; Haley, 164-165; 172-176. Mr. Haley said that it was necessary to remove two feet of ballast to get where the hole was, and he describes taking up the ceiling and floor (175-178).

As to the condition of the ship and the steps taken to have her fit the petitioners refer to the testimony of Surveyor Smith (56-57; 62-66); Drake, naval architect (67-69); Connell, port captain (71-75); Worke, superintending engineer (75-83); Martin, surveyor (88-98), and Agro, who cleaned out the bilges and examined the cement in April and November, 1911 (50-55).

The bill of lading relieved the ship and the carrier from liability for damages arising from

"any latent defect in hull * * * or by unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the shipowner or manager; by collision, stranding or other dangers or accidents of steam navigation of whatever kind" (229).

The testimony already referred to supports the proposition that due diligence was exercised as well as that the steamer was in fact seaworthy. It is conclusively established that the petitioners employed competent and skilled men, such as Captain Connell, port captain, and Mr. Worke, superintending engineer, and did not limit the expense incurred to put and keep the ship in a seaworthy

condition; that these skilled men did perform their duties and reported that the ship was in a seaworthy condition, and that having thus done all in their power the petitioners not only complied with the conditions of the bills of lading but also with those of the Harter Act, concerning due diligence. It has been held that seaworthiness does not require perfection. *The Rover*, 33 Fed. Rep. 515, 521.

The only defects chargeable by the libellant were as to the piping system and as to the thinness of the plate where the hole was found. The charges as to the piping system completely broke down, since the rose box which Captain Bagger missed was completely accounted for, having been removed while the hold was being cleaned out after the damage happened. As to Captain Bagger's criticism that there were too many elbows in the suction pipes, that does not affect the seaworthiness of the ship, for the piping system was constructed in accordance with the rules of Lloyd's and other classifying associations, and in addition was usual and proper (37-38, 89-90). As to the thinness of the plate, the evidence on both sides is that the plate in the immediate neighborhood of the hole was worn thin. However, this was not discoverable by the exercise of any diligence. The petitioners have brought themselves strictly within the principle laid down by Judge Addison Brown in *The Alvena*, 74 Fed. Rep. 252, 254 (aff'd. 79 Fed. Rep. 973), where he said:

"Due diligence in repair and equipment must be exercised in fact."

It is difficult to conceive what steps the petitioners could have taken in addition to the steps that were taken

to discover the defect. The hole was close to a frame between the floors of the vessel and close to the bilge keelson. Mr. Martin sounded a plate near the patch put on over the worn plate, but subsequent drilling showed that tapping was not a true test, and it seems not to have been possible to determine by hammering on the outside of the steamer whether the inside cement was loose or not (91-93). Mr. Martin testified (95):

"The hole was close, as described, to this wash plate, which was really an intercostal, and at that point the depth of the floor was very much less than it was at the center line, and you couldn't get under; you couldn't crawl under, but you would have to take up the ceiling pretty close up to it. Then if you had only one width of a plank ten inches, you could see; but if you had limberboards every two or three feet it might be difficult to see this up close to the wash plate."

The proofs show that the *Julia Luckenbach* was well kept up, was carefully and frequently surveyed, that her plates were examined in accordance with the practice of surveyors and the rules of the classifying associations, that the permanent ceiling was taken up every four years, as required by those rules and by good practice; that the cement was tested and found tight; that the limbers were cleaned thoroughly on each voyage before taking cargo; and that everything was done that could be done by a careful owner and thorough surveyors to make and keep the ship in all respects seaworthy.

The bills of lading which the Insular Line issued are available to the ship as well as to the Insular Line, and under the terms thereof, as well as under the Harter Act, since the petitioners exercised due diligence, they are not liable for the cargo damage. *The Carib Prince,*

170 U. S. 655; *The Wildcroft*, 201 U. S. 378; *The Aggi*, 107 Fed. Rep. 300; *The Ontario*, 106 Fed. Rep. 324; *Jay Wai Nam* v. *Anglo-American Oil Co.*, 202 Fed. Rep. 822; *The Charlton Hall*, 207 Fed. Rep. 343.

The force of our contentions with respect to seaworthiness and due diligence is greatly enhanced by the evidence that the hole in the plate was caused by the steamer's grounding while loading her cargo at San Juan.

Article 7 of the charter-party (235) provided:

"That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always lie safely afloat at any time of tide."

Article 9 (235) provided that the captain should be "under the orders and direction of the charterers as regards employment, agency, or other arrangements."

It was therefore the duty of the respondent Insular Line to provide a berth at which the steamer might lie safely afloat at all times. This it did not do, and it cannot recover and must itself be held liable for any damage which resulted from this breach of the charter-party.

The evidence is that the steamer was aground at San Juan and that thereby she was injured by some hard substance on the bottom is fully established. In the first place, it is apparent from the diagram made by Mr. Worke and Mr. Martin (opposite p. 214) that any hard substance on the bottom would be likely to pierce the plating where the hole was. Chief Engineer Knudsen testified to an entry in the log (101) reading:

"Ship hard aground at Quartermaster's Dock while loading the last of her cargo."

Chief Officer Haley testified to the same effect (160), and so did Captain Rodick (129).

After the steamer had put back to San Juan and was unloading cargo Captain Rodick sent a diver down to find the hole. On the first day he did not succeed, but found it the second day (104). Mr. Knudsen saw the hole, which was about an inch in diameter right through the plating, and he testified (105):

"Q. Could you tell which way, by looking at it, it was broken, what way it started?

A. It appeared to be pressed up from the outside up to the inside.

Q. How did it look to you as to what was the cause of it?

A. I judge at the time she was fast aground at San Juan at Quartermaster's Dock some sharp substance had pressed through the plate and stayed there until we came to sea, and when we got—the ship got to moving and working it fell out."

* * * * * * *

"Q. How do you account for the fact that if this substance was in and the hole was made while lying aground at San Juan, you got to sea before it started; how do you account for that?

A. If it was a substance that would go through the plate it would stay in the plate and remain there until the ship started to work back and forth, and when it did of course it would fall out, would work out, as there was nothing at sea that would do damage to the ship."

Knudsen's testimony as to the cement and its condition around the hole indicates that the breaking of the cement was caused by the ship being aground (106-107). The surface of the plate when he saw it was a little buckled just at the hole (123-124). He testified that the plate was about $\frac{5}{8}$ of an inch thick (185); that

the bottom was not soft mud, he believed (125), and that (107):

"Could it be from any other way than by some contact to break it?

A. No, sir, it has got to come in contact with something to break it."

Captain Rodick stated (134-135):

"A. It was my opinion that anything that made a hole through the side, caused this hole, and it was left there until we got out to sea, where the sea would work it, and then it dropped out. * * *

The cement had lifted on the forward part of the leak and on the after part of the leak, of this hole; in fact there was no cement there. * * *

It was in my opinion something penetrated the side and made the hole and lifted that cement and loosened it."

Testifying as to his observation of the hole, he said (164):

"In my estimation from the inside, it was caused by getting in on some hard substance which had caused a hole, going up through the ship; it looked to me as if the hole was made from the outside. * * * It looked like you take a piece of paper and shove your hand through it; it kind of pressed the edge up on the inside; it looked like something had shoved it up."

As to the cement, he said (164-165):

"It looked to me like it had been knocked up by something from below, the cement was good around the outside of the hole." * * *

"The only thing I saw could break it was something coming up through the bottom of the ship; she lay on something hard and it shoved up through the bottom; I was certain the hole was made from outside in; that looked very plain in my estimation."

He said further (165):

"Q. Can you account or give any reason why this hard substance which you say must have penetrated from the outside in, could remain in the ship from the time of leaving San Juan, going to Arecibo, and until started on your voyage and being out about a day or so before anything happened, what do you say about that?

A. My expression on that would be that whatever it was was forced into the hole with such force that it never fell out again until such time as she got out in the seaway and pressed it out straining."

First Assistant Engineer George A. Little testified to the same effect. He said (183):

"Q. Could you tell from looking at that hole what was the cause of it?

A. It seemed to me as if she had been resting on something on the outside; seemed to be caved inward.

Q. How did the inward part of the plate look to you when you looked at it?

A. It looked to me like as if she had been aground somewhere and been resting on something, whatever it was, and when we got to sea and she was working up and down in the seaway it finally worked through.".

He also said (188):

"There are a lot of sunken piles sunken down there, and we are always afraid of breaking the blade or something; there might be scrap iron or something."

Chief Officer Haley also testified (181):

"Q. In discharging iron at Quartermaster's Dock do you know whether or not any fell overboard while discharging?

A. I know that to be a fact; we have lost it overboard ourselves there.

Q. What kind of iron was it?

A. We have lost iron rails, railroad iron; we have lost iron bars; we have lost machinery, etc.

Q. Was that in the *Julia* or in other vessels?
A. In the *Julia;* that I know myself for I have seen that."

Captain Dow of the *Boringuen*, testifying for the Insular Line that the dropping of the lead at the San Juan dock only indicated that the bottom was mud, admitted that that did not tell whether there was any iron or rocks or stones there (208).

The testimony of the master and officers of the *Julia Luckenbach* stands uncontradicted and establishes that the steamer was seaworthy when she left New York and when she arrived at San Juan; that she was hard aground at the Quartermaster's Dock at San Juan while loading there; and that while so aground some hard substance or object penetrated her bottom from the outside making the hole which was afterwards discovered in the plate after she put back to San Juan, which testimony is also supported by the testimony of the witnesses who examined the steamer after her return to New York. For the damages thereby caused the Insular Line, because of breach of its obligation to furnish a safe berth, is solely responsible.

## THIRD POINT

THE PETITIONERS ARE ENTITLED TO LIMIT THEIR LIABILITY TO THE VALUE OF THE JULIA LUCKENBACH AND HER PENDING FREIGHT NOTWITHSTANDING THE MAINTENANCE CLAUSE OF THE CHARTER.

Section 4283 of the United States Revised Statutes (9 Stat. L., 635) provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Section 18 of the Act of Congress of June 26, 1884 (23 Stat. L., 57) provides:

"The individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. * * *"

The damage to the sugar cargo was $100,774.87, for which amount the Circuit Court of Appeals held the petitioners liable. The value of the *Julia Luckenbach,* with pending freight and interest, was $76,709.22, to which amount the District Court limited the liability.

The Insular Line contended in the Circuit Court of Appeals, and perhaps will contend here, that the petitioners are not entitled to limitation of liability because

of the maintenance clause of the charter-party, which reads as follows (234):

"1. That the Owner shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. Owner also to furnish blocks and falls as customary for handling cargo up to 3 tons (Gross) in weight, also winches."

The Insular Line also relies on *Benner Line* v. *Pendleton*, 217 Fed. Rep. 497, affirmed by this Court March 25, 1918. That case involved a voyage charter-party containing a provision that the vessel should be "tight, staunch, strong, and in every way fitted" for the voyage, and the loss was found to have resulted from unseaworthiness existing when the schooner began the voyage.

In this case the seaworthiness of the *Julia Luckenbach* when delivered under the time charter cannot be questioned. At the time of the damage she had been in service under the charter nearly a year and had made several voyages without any material damage to cargo. It is therefore to be presumed that she was seaworthy when delivered to the Insular Line under the charter-party. The question in this case is thus seen to be not one of breach of warranty of seaworthiness, but whether the maintenance clause prevents limitation of liability under the statute.

A. The Limited Liability Statute applies to every case of liability on account of the vessel where the owner is free from privity or knowledge.

Section 4283 R. S. provides that the liability *"shall in no case exceed"* the owner's interest in the vessel and

pending freight, and section 18 of the Act of June 26, 1884, provides that the aggregate liabilities of all the owners "shall not exceed" the value of the vessel and pending freight.

The statute must be applied to every case where the loss happens without the privity or knowledge of the owner. There is no principle of construction to justify the exclusion of specific cases falling within the language of the statute, which has always been liberally construed.

That the statute contemplated contracts is made clear by the reference to property, goods and merchandise shipped or put on board the vessel, and by the reference in section 4286 R. S. to the chartering of a vessel. When the Limited Liability Act was passed in 1851 the transportation of goods was always pursuant to contract, just as now, either by bill of lading or charter-party, to which the warranties of seaworthiness attached. Ships do not move and no service is performed with or by means of ships except by virtue of a contract or an agreement on the part of the shipowner, and therefore the personal contract doctrine could be applied to prevent limitation of liability in every case, as to carriage of passengers and cargo.

The contract has always been that of the shipowner, although in some instances made for him by others. Of course, in many cases it is possible for the damage claimant to sue the shipowner in tort as well as contract, but it is hardly to be supposed that the application of the Limited Liability Act can be made to depend on the form of action chosen by the damage claimant. It is inherently improbable, therefore, that the existence of a con-

tract, even if the claim is made under the contract, is sufficient to prevent the application of the Limited Liability Act. We think the authorities support our proposition that the act applies in every case of liability on account of the ship where the damage happened without the privity or knowledge of the owner, irrespective of whether the damage resulted from a tort or from breach of a contract.

B. The damage happened without the privity or knowledge of the petitioners.

The District Court held (262):

"It has been affirmatively shown that the owners of the *Julia Luckenbach* were not privy to, nor had they knowledge of her unseaworthiness."

This finding was not disturbed by the Circuit Court of Appeals.

Understanding of our proposition that the statute applies irrespective of whether the liability on account of the ship arises from tort or breach of contract will be aided by a consideration of the meaning of "privity or knowledge".

What is privity or knowledge? Briefly stated, "knowledge" is a conscious knowledge of something causing the loss with respect to which the shipowner has a duty; and "privity" is a negligent failure to use this conscious knowledge to prevent the loss. The expression means some personal concurrence of the owner in the accident or the circumstances which created the loss. In *Lord* v. *Goodall, etc., S. S. Co.*, 4 Sawy. 292, Fed. Cas.

8506 (aff'd. 102 U. S. 541), Judge Sawyer said, at page 887:

"As used in the statute, the meaning of the words 'privity or knowledge', evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or of the condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions."

Neglect does not always constitute privity, as Chief Justice White said in *La Bourgogne*, 210 U. S. 95, 122-123. See also *Providence, etc., Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 602; *Quinlan* v. *Pew*, 56 Fed. 111, 115, 116. For neglect to be privity it must have been directly participated in by the owner. See *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 646.

The knowledge mentioned in the statute must be a conscious knowledge. It is not enough to know facts unless their significance is or ought to be known. Thus in *Kidston* v. *McArthur*, 5 Sess. Cas., 4th Series, 555, a shipowner who observed the position of lights improperly placed by the master was held not to be in privity because it appeared that he was not schooled to the sea. In *Quinlan* v. *Pew*, *supra*, it was held that an owner need know nothing about the construction, inspection or navigation of his vessel and might properly leave such matters to competent agents.

The owners of the *Julia Luckenbach* were free from

privity or knowledge, concededly. They employed a competent port captain and port engineer to inspect the vessel, and, in addition, the ship had been carefully inspected by several surveyors for underwriters. The hole in the lower plate of the vessel was a latent defect, was not discoverable by the exercise of ordinary care, and was not discovered by the skilled persons employed by the owners. They did all in their power to keep the ship seaworthy.

Shipowners must act through and rely on their agents for inspecting and fitting out their ships.

In *The Tommy*, 151 Fed. Rep. 570, 573, the Circuit Court of Appeals for the Second Circuit stated the rule that

"Where the owner has provided a suitable person or persons as its agents to inspect, or provide for the proper equipment of, the vessel, he is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent, where he has had no notice or knowledge of such negligence or resulting defect."

The fact that a ship may be unseaworthy does not fix the owner with privity or knowledge. In *Quinlan* v. *Pew, supra,* at page 118, Putnam, *C. J.*, said:

"We are also constrained to the belief that this statute, which the Supreme Court directs shall be interpreted broadly, has regard for the usual necessities of the occupations of life, and in that respect intends that the owners may avail themselves of the proper facilities common to business men, and be relieved, so far as it is concerned, whenever and so far as they have appointed a suitable representative, be he master, consignee, or other agent, to supervise the ship, either at sea or at the home port, or otherwise, and either for fitting her away, or navigating her after she is fitted away".

In *Boston Marine Ins. Co.* v. *Metropolitan Redwood Co.*, 197 Fed. Rep. 703, 709, the Circuit Court of Appeals for the Ninth Circuit said:

"But we cannot concede that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, machinery or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge, and our attention has been directed to no authority which so holds."

In *The Annie Faxon*, 75 Fed. Rep. 312, the same Court held that if the shipowner had in good faith employed a competent person to inspect the boiler which later exploded, privity or knowledge with respect to the defective condition of the boiler should not be imputed to the owner unless the defects were apparent and of such a character as to be detected by the inspection of an unskilled person.

In *The Republic*, 61 Fed. Rep. 109, the Circuit Court of Appeals for the Second Circuit denied limitation to the owner of an excursion barge which proved too weak to encounter a severe wind storm, and was unseaworthy by reason of the rottenness of her masts and stanchions. The president of the corporation owner had inspected the vessel and failed to discover any unsoundness. Limitation was denied, not on the ground that the vessel was unseaworthy, but on the ground that the owner was in privity, and Wallace, *C. J.*, said, at page 113:

"In the present case the privity or knowledge of the corporation consisted in the negligence of its president, who by his omission of proper care in his examination of the vessel, failed to discover her defective condition."

In *The Colima*, 82 Fed. Rep. 665, Judge Brown, in the Southern District of New York, granted limitation against damage resulting from improper loading of the ship at San Francisco, resulting in instability, so that the ship was unseaworthy. The loading had been entrusted to the master and first and third mates, who directed the stowage by the stevedore. Judge Brown said, at page 679:

"Privity and knowledge are chargeable upon a corporation when brought home to its principal officers, or to the superintendent who is its representative; and if such privity or knowledge were here brought home to Mr Schwerin, the petitioner's superintendent, they would be chargeable upon the corporation. But the privity or knowledge referred to in this statute is not that which arises out of the mere relation of principal and agent, by legal construction; if it were, the statute would have nothing to operate upon; since the owner does not become liable at all except for the acts of himself or his agent."

In *Van Eyken* v. *Erie R. R. Co.*, 117 Fed. Rep. 712, Judge Thomas, in the Eastern District of New York, granted limitation against damage resulting from the set screw of a tug's steam steering gear becoming loose and allowing the rod to become disconnected. The screw had been set two years previously and had never been inspected, although the owner's agents were charged with the duty of inspection.

In *Quinlan* v. *Pew*, *supra*, limitation was granted against damage for injuries sustained by a sailor from the bull's eye on the jib peanant becoming cracked. It appeared that this condition existed before the voyage began and the vessel was therefore unseaworthy. The master had been employed to put the vessel in condition and the defect could not have been discovered by a reasonably good inspection.

In *Smitton* v. *Orient Steam Nav. Co.*, 12 Com. Cas. 270, 276-277, it was held that any fault of the marine superintendent of a steamship company in having the ship constructed in a particular manner would not be the actual fault of the Company within the meaning of the British Limitation Statute. See also *The Harry Hudson Smith*, 142 Fed. Rep. 724.

From these authorities it can only be concluded that a shipowner must be held free from privity or knowledge notwithstanding negligence, notwithstanding his entire ignorance of his ship and its operation, and notwithstanding unseaworthiness even, provided he has placed the building, inspection or navigation in the hands of competent agents, unless with conscious knowledge of the effect of his action or inaction he has directely participated in the act causing the loss or has failed to take effective steps within his power to prevent it.

This conclusion is illuminated by the language of Sawyer, *C. J.*, in *Lord* v. *Goodall, etc., S. S. Co.* (*supra*), where the suit was brought to recover the value of goods shipped on the steamer *Ventura* under bills of lading. The steamer ran ashore because of a defective compass.

"It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew; and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act. But the owner, under this act, is not an insurer. If he exercises due care in the selection of the master and crew, and a loss afterward occurs from their negligence, without any knowl-

edge or other act or concurrence on his part, he is exonerated by the statute from any liability, beyond the value of his interest in the ship and the freight pending. So, also, if the owner has exercised all proper care in making his ship seaworthy, and yet some secret defect exists, which could not be discovered by the exercise of such due care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated, for it cannot be with his 'privity or knowledge', within the meaning of the act, or in any just sense, and the provision is that 'The liability of the owner * * * for any act, matter, or thing, loss, etc., * * * occasioned without the privity or knowledge of such owner or owners, shall, in no case, exceed the amount or value of the interest of such owner in such vessel and her freight then pending'. This language is broad, and takes away the quality of warranty implied by the common law against all losses except by the act of God and the public enemy" (15 Fed. Cas., 887-888).

If the reasoning of these authorities is sound, the fact that it may be the owner's duty, whether by express contract or implied contract, to have his ship seaworthy should not defeat his right to limitation against damage resulting from unseaworthiness, provided he is not chargeable with privity or knowledge of the unseaworthy condition.

C. This case is not similar to those where limitation of liability has been denied because of a "personal contract".

In the Circuit Court of Appeals the Insular Line rested its theory of "personal contract" on *Great Lakes Towing Co.* v. *Mills Transp't. Co.*, 155 Fed. Rep. 11; *The Loyal*, 204 Fed. Rep. 930; *The Amos D. Carver*, 35 Fed. Rep. 665, and also on the following language of Mr. Justice Lurton in *Richardson* v. *Harmon*, 222 U. S. 96, 106:

"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship

in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

As to this language Judge Hough said in the District Court (263):

"To quote this remark or any of the cases cited by its maker, as justifying the doctrine that every contract without regard to its nature or method of performance, puts the contractor outside the limitation laws is (to say the least) singular. * * * It is necessary for an owner to employ master and crew to navigate his vessel, it is just as necessary for him to employ agents, inspectors, shipwrights and the like to inspect his vessel in order to ascertain her condition before the voyage begins. The same reason should lead to the same results in both cases."

Judge Hough's comment is well justified by other language of Mr. Justice Lurton's opinion than that above quoted. At page 102 Mr. Justice Lurton said:

"The contention upon the one hand is that the limitation is extended only to obligations *ex contractu*, while upon the other, that every kind of liability which might fall upon an owner on account of the ship incurred without his knowledge or privity is given the benefit of the provision. That it was intended to limit the owner's liability in respect of debts contracted on account of the ship is plain."

The conclusions to be drawn from the *Great Lakes Towing Company* case must be limited to its own facts. The contract there was that the petitioner should pay the Great Lakes Towing Company certain amounts for wrecking services to the steamer *Newcago*. It contemplated no service whatever by the *Newcago*. The service was unsuccessful and only about $156 of the remnants of

the *Newcago* were saved. The wrecking bill was $4,500. The Circuit Court of Appeals for the Sixth Circuit held that this was not a case for limitation, which is obvious enough, because the petitioner's contract was not for service by its ship, but was merely to pay money. The language of the Court, at page 16, shows perfectly clearly the basis of the decision:

"If in every case the party who should undertake to render assistance to other vessels on the request of the owner should be dependent on the proceeds of the vessel for his compensation, he would be liable to consider the chances, and the sorer the need of the service the less likely would the owner be to secure them."

If the *Great Lakes Towing Company* case contains language broad enough to cover all contracts of an owner it is pure dictum. The owner's undertaking there was entirely irrespective of the vessel, and the service with respect to the vessel was performed by the other party to the contract.

So in *The Amos D. Carver*, 35 Fed. Rep. 665, relied on by the Insular Line, the owner's contract was for supplies to be furnished to the vessel and was entirely independent of any service to be performed by the vessel. Judge Addison Brown reached the same conclusion in *Laverty* v. *Clausen*, 40 Fed. Rep. 542, and denied limitation to an owner against damage arising from the breach of his contract to insure a cargo; also in *Gokey v. Fort*, 44 Fed. Rep. 364, the same Judge held that a shipowner might not limit liability against bills for repairs to a vessel. In the latter case he said, at page 366:

"It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners 'on account

of the ship' does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master under his general powers in the course of the voyage."

These decisions illustrate very well the meaning of "personal contract", and show that a personal contract is one to be performed by the owner entirely irrespective of the vessel.

If signing by the owner is to be the test of such a personal contract as will defeat the right of limitation, then an owner not signing could limit liability notwithstanding unseaworthiness at the beginning of the voyage, if that was without his privity or knowledge. We cannot believe that the right to limitation depends on the accident of who signs the charter. If we are correct in this, the right to limitation depends on the nature of the contract, and if it is a contract on account of the ship and to be performed by the ship (as this charter party with the Insular Line was), and the liability arises out of the prosecution of the business of the ship (as this liability did) the owner may always limit liability if free from privity or knowledge. On the other hand, if the contract is irrespective of the ship and does not require service by the ship—although the other contracting party may perform service to the ship—then there is no right to limitation.

In *The Loyal*, 204 Fed. Rep. 930, Noyes, *C. J.*, with whom Lacombe, *C. J.*, concurred, not without hesitation, held that a general contract to furnish lighters carried with it an implied contract that each lighter furnished should be seaworthy, and that the owner might

not limit against damage resulting from the unseaworthiness of one of the lighters. It there appeared, however, that the owner was in privity with the unseaworthiness producing the damage, and Ward, *C. J.*, based his concurrence in the result on the ground that the owner was not without privity or knowledge. At page 933 he said:

"But I cannot concur in the conclusion that the petitioner is deprived of the benefit of the acts on the ground that it has personally contracted to do the lighterage business of the Apollinaris Company, the owners of the cargo for a fixed term. The contract contained no engagement on the subject of seaworthiness at all. The law itself imposed the duty. The breach of the implied warranty of seaworthiness is a tort, a breach of duty rather than a breach of a personal contract.

If the implied warranty of seaworthiness is to be regarded as a personal contract, shipowners cannot limit their liability in case of the death of or injury to passengers at all because the law implies in the contract of carriage a duty to carry with care. Nor can they ever limit in the case of a loss of or damage caused by unseaworthiness to cargo carried under bills of lading, at least when signed by them as owners, as is the case with all regular steam lines. Such results, would, I think, be a great surprise to all interested."

Judge Ward also quoted from *Quinlan* v. *Pew*, 56 Fed. 111, 119, as follows:

"Neither can the proposition of the appellant be maintained, that the statute does not apply because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading, so that, if the contention of the complainant is correct, the wings of the

statute would be effectually clipped. That there may be certain contracts, relating not so much to the navigation of the ship as to fitting her for sea, by which the owners charge personally their own credit, and which do not come within the statute, may be well contended, without at all touching the principles here involved."

Coming now to consider cases where limitation has been granted notwithstanding contracts which were as much personal contracts as the charter party in the case at bar, see *The Republic*, 57 Fed. Rep. 240, aff'd 61 Fed. Rep. 109, where the owners sold passage tickets or hired out the barge by the day. Certainly a passage ticket is as much a personal contract as a charter party, and contains an implied, if not an express, warranty that the vessel shall be seaworthy. A more recent instance of granting limitation of liability as against a personal contract is *La Bourgogne*, 144 Fed. Rep. 781, affirmed 210 U. S. 95. It distinctly appears that the claims arose under passage tickets and that the damages proved exceeded the limitation fund. Notwithstanding this, Coxe, *C. J.*, said, at page 782, that the petitioner had "no substantial pecuniary interest in the disallowance or rejection of the claims in controversy". Such a decision would have been impossible if the tickets had been personal contracts of such a nature as to defeat limitation. The petitioner in that case relied on the ticket provisions and thus adopted the contracts as its own, irrespective of whether it had personally signed them all or had signed them only by an agent. So in *The Jane Grey*, 99 Fed. Rep. 582, 585 (D. C. Wash.) the passengers against whom limitation was granted travelled under contract passage tickets.

D. The District Court correctly held that the original warranty of seaworthiness had been exhausted as between the petitioners and the Insular Line, and that by the maintenance clause the petitioners did not give up the benefits of the Limited Liability Statute.

Judge Hough said in the District Court (266):

"It is right—and has never been doubted—that the owner who time charters his vessel thereby binds his vessel to whatever lawful freight the charterers put in her, and for the safe transportation and delivery of that freight he should hazard his vessel. But to bind himself to an unlimited liability by such charter party for a period of years is a most extreme contention—and (accepting the Benner Line decision at full value) it depends solely on the meaning to be given to the language of the maintenance clause.

"In a case where the demand of the charterers was far less extreme than that here propounded, this question has been considered.

"In *Giertsen* v. *Turnbull* (Sessions Cases 1907-1908, page 1101 [1110]) it was held that a series of voyages under time charter did not come within the stages-of-voyage doctrine of *The Vortigern* [1899] Pr. 140, and also that in a time charter 'the implied warranty of seaworthiness was complied with when the vesssel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including, of course, the expense of all necessary repairs.'

"The doctrine of this case has been received without comment or objection by Messrs. Scrutton and Carver."

In the Circuit Court of Appeals the Insular Line cited several cases holding that a ship was unseaworthy upon leaving any port in the currency of the charter without sufficient coal. It cannot be doubted that an owner could limit liability for the damage thereby resulting, since it

arises from the negligence or error in judgment of the master in the control of the ship when beyond the owner's supervision.

Matters covered by the maintenance clause are quite as frequently beyond the control of the owner as the supply of coal to be taken on board at a foreign port. On a voyage under a time charter a ship may fall in need of repairs, and on arrival at a port where it is practicable to repair, the master may neglect entirely to make repairs or to advise the owner of their necessity. Can it reasonably be contended that in such a case the owner is deprived of his right to limit liability?

If the argument be carried one step further, a ship may become unseaworthy in the course of a voyage when it is utterly impossible to make repairs before reaching port. If the maintenance clause be strictly construed and the doctrine as to limitation of liability contended for here by the Insular Line be applied, then the owner might not limit liability for the resulting damage. Such a conclusion demonstrates the absurdity of the proposition contended for. The case just put is not imaginary. In *The Burma,* 187 Fed. Rep. 94, the Circuit Court of Appeals for the Second Circuit decided that the maintenance clause was broken where the vessel's machinery was disabled or rendered inefficient during the voyage by reason of the inability of the engineers to use properly the coal furnished by the charterers. There the engineers were beyond the control of the owner, and the breach was without the owner's privity or knowledge. We cannot bring ourselves to doubt that limitation of liability would be granted in such a case.

But if limitation is granted in such a case it is because the owner is free from privity or knowledge. Why, then, should it not be granted in every other case under the maintenance clause where the owner is free from privity or knowledge? The words of the clause must be given the same effect under all circumstances, and their meaning cannot be altered by the accident that on one occasion the ship may be at sea when the clause is broken by the engineers or crew, and on another occasion may be in port when the clause is broken by a competent surveyor or port captain failing to discover what may several months later turn out to be a cause of unseaworthiness.

E. The application of the personal contract doctrine to this case frustrates the purpose of the Limited Liability Act.

All maritime nations have for centuries permitted and enabled shipowners to limit their liability for damage occurring without their privity or knowledge to the amount of the funds invested in the enterprise. In the nature of the shipping business performance of the shipowner's exacting obligations must be largely confided to agents. If error or oversight of these agents could bring ruin to the shipowner, that would seriously affect the ship owning business. The effect of the decision of the Circuit Court of Appeals is that since the shipowner is not obliged to enter into a charter-party, by entering into such a contract he renounces all claim to the exemption which the law expressly permits, thus overlooking that the law was passed and would only be useful on the assumption that such contracts would be entered into. It must be assumed that Congress intended a substantial benefit to shipping. But if the qualification made by

the Circuit Court of Appeals stands the supposed benefit of the limited liability statute will be negligible and delusive.

The personal contract doctrine defeats the intent of Congress to relieve the shipowner from excessive liabilities or obligations which by necessity must be performed by deputy. In determining whether the owner may limit liability the Circuit Court of Appeals has looked at the source of his duty, *i. e.*, the maintenance clause in the charter; but since the duty of maintaining the ship can be performed only by deputy, it should be immaterial whether the duty originated in the owner's contract or was imposed by law. The deputy is as likely to commit a breach of contract as to commit a tort. Therefore performance of the duty should be the thing principally considered, and if it turns out that any fault in performing the duty was without the privity or knowledge of the shipowner he should be granted the benefit of the statute. If a statute designed to foster shipping expressly exempted the shipowner's general property from liability for an agent's tort, but not for an agent's breach of contract, it would be called absurd and practically self-destructive. It is difficult to see how the decision of the Circuit Court of Appeals in this case can be regarded otherwise than destructive of the intent of the Limited Liability Act.

F. The decision of the Circuit Court of Appeals is inconsistent with early decisions of this Court.

Certainly the decision is inconsistent with that in *Providence & N. Y. S. S. Co.* v. *Hill Mf'g. Co.*, 109 U. S. 578, which, as appears from the report in the Court

below, 113 Mass. 495, was a suit in contract and tort. The Transcript of Record shows (p. 2) that the plaintiff's first count was in contract, as follows:

"And the plaintiffs say the defendants are common carriers of goods and merchandise, and that on the twenty-second day of May, in the year of our Lord one thousand eight hundred and sixty-eight, they received in Providence in the State of Rhode Island, from the plaintiffs' agents, thirty cases of bleached cotton cloth, which they agreed with the plaintiffs to transport safely from Providence, aforesaid, to the City of New York for a certain compensation then and there agreed to be paid to said defendants. And the plaintiffs say that * * * the defendants did not transport the same safely to New York, but while being so transported by the defendants the said cloth was injured by fire to the extent of Six thousand dollars."

At pages 7-8 of the Transcript of Record the defendants answered thus:

"And these defendants, further answering, say that if said cotton cloth was ever received by the defendants to be transported or carried from said Providence to said City of New York, or if the defendants ever agreed to transport or carry the same from said Providence to said City of New York, it was under a special written agreement with the plaintiffs or their agents, which these defendants believe to be in the possession of the plaintiffs, wherein and whereby it was in substance expressly stipulated and agreed between these defendants and the plaintiffs and their agents that the dangers, loss and risks to said cotton cloth of and by the seas, fire, water, breakage, leakage, rust, frost and all other accidents should be borne by the plaintiffs and owner of said cotton, and not by the defendants."

If this Court had then supposed that the defendants' making a contract to transport the goods (which was just as much a personal contract as the charter-party in

the case at bar), prevented the application of the limited liability act, the proceeding which was the subject matter of that decision could not have been maintained, and Mr. Justice Bradley would not have said, at pages 588-589:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

And the decision of the Circuit Court of Appeals is inconsistent with the principles and purposes stated by Mr. Justice Bradley in *Norwich Co.* v. *Wright,* 13 Wall. 104, 121-122:

"In view of the fact that the limited liability of shipowners was, by the general maritime law, extended to all acts of the master except contracts for the benefit of the ship, and in most places even to these; and of the fact, that the English statutes expressly extended it to cases of collision as well as to injuries to cargoes; we see no reason why the fair natural construction should not be given to the act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage shipbuilding and to induce capitalists to in-

vest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent shipowners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ.

The theory of the limited liability act was expressed by Senator Warner Miller of New York when the amendment of 1884 was under discussion in Congress. In Vol. 15 of the Congressional Record, pages 3970-3971, Senator Miller said:

"As I understood the sentiment of the Committee, it was really to make the ownership in all sea-going vessels a limited liability company in which every individual was liable for only his share. That was notice to the whole world that nothing but the ship was holden. * * * It seems to me that in order to encourage the investment of capital in ship-owning we have to do substantially this: We have to make each ship company a

limited liability company, and that is notice to everybody. If that is understood to be our law everybody who trusts a ship does it with a full knowledge that there is nothing back of it save the ship itself."

## LAST POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THE DISTRICT COURT SHOULD BE DIRECTED TO ENTER A DECREE DISMISSING THE LIBEL, OR, IF THE LIBEL BE NOT DISMISSED, THEN LIMITING THE LIABILITY OF THE PETITIONERS TO $76,709.22, THE VALUE OF THE JULIA LUCKENBACH AND PENDING FREIGHT.

PETER S. CARTER
CHARLES C. BURLINGHAM
Proctors for Petitioners

PETER S. CARTER
ROSCOE H. HUPPER
Of Counsel

April, 1918

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 51

EDGAR F. LUCKENBACH, *et al.*, Claimants of S.S. *Julia Luckenbach*,
Respondents-Appellants-Petitioners,

*against*

W. J. McCAHAN SUGAR REFINING COMPANY,
Libelant-Appellee-Respondent,

*and*

INSULAR LINE,
Respondent-Appellant-Respondent.

# BRIEF FOR RESPONDENT INSULAR LINE

## STATEMENT OF THE PROCEEDINGS

This cause is in this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Sec-

ond Circuit, issued on the petition of Edgar F. Luckenbach and others, respondents and claimants of the Steamship *Julia Luckenbach*.

The original libel for $60,000 was brought by the McCahan Sugar Refining Company jointly against the Steamship *Julia Luckenbach, in rem*, and the Insular Line, Charterer, *in personam*, to recover for damages to a cargo of sugar shipped on the Steamship *Julia Luckenbach*, due to unseaworthiness of the ship. The Charterer appeared, the Steamship *Julia Luckenbach* was claimed and a stipulation for $60,000, fixing the value of the vessel at that sum for the purposes of this suit, was made and filed.

Later the libelant was permitted to amend the libel so as to increase the claim to $87,526.65, whereupon the charterer petitioned in the owners of the *Julia Luckenbach*, in order that they might respond for so much of the recoverable loss as should exceed the agreed value of the steamer.

The libel proceeds against the charterer as the carrier under bills of lading issued by it to the shipper, but alleges that the damage was caused by unseaworthiness of the *Julia Luckenbach* and failure of the shipowners to use due diligence to make the ship seaworthy and fit for the voyage.

The grounds of the petition of the Insular Line, impleading the owners of the *Julia Luckenbach* were that the time charter of the ship from the owners to the Insular Line, was signed by one of the owners personally for all; that it contained the usual express warranty of seaworthiness and a covenant to maintain the ship in a seaworthy condition for and during the service; and that

if libelant's charges were correct, there was a breach of the personal covenant of the owners to the charterer, under which they would be bound to indemnify the charterer against any liability arising in the suit.

The cause was tried before Hough, D. J., on December 22nd & 23rd, 1913. In his opinion, Judge Hough held that the owners did not exercise due diligence to make the vessel seaworthy. He further decided that neither the charterer nor owners were entitled to the benefit of insurance, in accordance with one of the clauses of the bill of lading. *Opinion*, 240-245.*

Subsequently, further proofs were taken and a motion for limitation of liability was made by claimants and owners of the steamer. The motion was heard on September 22 and September 30, 1914, before Hough, D. J., who granted the motion in an opinion handed down October 12, 1914.

In this opinion, Judge Hough found that the value of the *Julia Luckenbach* was $60,000. It was agreed that her pending freight amounted to $6,600, with interest from May 25, 1912, and that libelant's damages amounted to $87,526.65 with interest from the same date. *Opinion*, 260-266.

The Court held that the owners of the *Julia Luckenbach* were not privy to nor had knowledge of her unseaworthiness and the owners were entitled to limit their liability to the value of the vessel and her pending freight, not only as against the libelant, but also as against the charterer's claim for indemnity. The latter

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*Unless otherwise stated references are to pages of the printed record.

ruling rests on a finding that the continuing covenant to maintain the seaworthiness of the ship, that was contained in the charter party with the Insular Line, was not a personal contract, such as to prevent limitation. *Opinion*, 260-266.

The final decree of the District Court for the Southern District of New York, entered January 6, 1915, ordered that the libelant should recover $87,526.65 with $13,129 interest, and $119.22 costs, amounting in all to $100,774.87; and of this sum the respondents, Edgar F. Luckenbach, *et al.*, should pay $66,600.00 with $9,990 interest, and $119.22 costs, amounting in all to $76,709.22 and the Insular Line should pay the remainder amounting to $24,155.65. *Final Decree*, 267-268.

It was also decreed that if any part of the $76,709.22 should not be paid by the owners of the steamship, the libelant should recover such part from the Insular Line, which should be indemnified by the shipowners. The decree limited the liability of the owners of the *Julia Luckenbach* to $66,600 the value of their interest in her and her pending freight, with interest, amounting as above to $76,709.22 and ordered that on payment by the claimant and owners of the Steamship *Julia Luckenbach*, of the amount decreed to be paid by them to the libelant, the libelant and the Insular Line, refrain from further prosecution of any suits to recover. *Final Decree*, 267-269.

The decree of the District Court denied the right of the charterer to indemnity as to the amount of the recovery, in excess of $76,709.22 and left it unconditionally liable for $24,155.65.

From this final decree, the respondent Insular Line, and also the owners of the *Julia Luckenbach*, appealed to the United States Circuit Court of Appeals, for the Second Circuit.

These appeals were argued on May 15, 1916. In the decision handed down June 6, 1916, the Court held that the *Julia Luckenbach* was unseaworthy, as the result of gradual corrosion of one of her plates; that the charterer could not take advantage of the statute limiting the liability of vessel owners, as against the cargo owners, because the charter was not a demise; that although the bill of lading contained an exemption from liability for damage by unseaworthiness the charterer was not protected by the Harter Act; that the libelant was entitled to recover in full against the charterer; that as between charterer and the Estate of Lewis Luckenbach, the trustee of which had personally signed the charter party, p. 238, the latter were liable for breach of the express obligation to maintain the steamer in a seaworthy condition; and that this part owner could not limit its liability upon that obligation. *Opinion*, 276.

The Circuit Court of Appeals thus modified the decree of the District Court so as to award the libelant its full damages, payable primarily out of the steamer, and the Estate of Luckenbach, any deficiency to be paid by the charterer with interest and costs. *Decree*, 277.

Edgar F. Luckenbach, *et al.*, claimants, petitioned this Court for a writ of certiorari, which was granted and in accordance with which the record of these proceedings was sent by the Circuit Court of Appeals to this Court. *Writ of Certiorari and Return*, 278-279.

## Facts

The Insular Line at the time in question operated a line of steamers between New York and the Island of Porto Rico. The *Julia Luckenbach* was chartered from her owners to run in this service. The charter-party, *Claimants' Exhibit C*, 234-238, was on the usual Government form of Time Charter, dated 25th October, 1910, and covered the period of three years and seven months beginning May 31, 1911. She had been operating under this charter-party about nine or ten months when the damage in question occurred.

This charter party was made between the estate of Lewis Luckenbach, owners of the steamer, and Insular Line, Inc., charterers, and was signed by "Insular Line, Inc., Per Jos. D. Phillips" and "Estate of Lewis Luckenbach, Per Edgar F. Luckenbach, Trustee." *Claimants' Exhibit C*, 238.

Though the charter on its face represented that the entire steamer was owned by the Estate of Lewis Luckenbach of which Edgar F. Luckenbach is trustee it developed later that Edgar F. Luckenbach personally was a part owner, to the extent of 10/80, the Estate of Lewis Luckenbach owned 54/80 and the Estate of Edward F. Luckenbach owned 16/80 of the steamer. *Petition and Answer*, 9, 16, 22. The owner retained possession and control of the steamer, and her master, officers and crew were in their employ. The owners warranted the steamer to be "tight, staunch, strong and in every way fitted for the service," *Claimant's Exhibit C*, 234, and that *they would "maintain her in a thoroughly efficient state in hull and machinery for and during the service." Claimant's Exhibit C*, 234.

The charter party did not operate as a demise of the ship.

The charterers enjoyed no possessory rights under the charter; they had no right or authority to make repairs, or even to make examination of the vessel to determine her fitness for the service. All the responsibilities in relation to seaworthiness originally, and the maintenance of the ship in a thoroughly efficient state throughout the charter party, were expressly placed upon the owner.

Some months after delivery, in April, 1912, pursuant to the charter party she loaded a part cargo of sugar in San Juan, Porto Rico, and on April 26, proceeded to Arecibo, to complete loading. On sailing from that port she encountered some rough weather and on April 28, was found to have 7 ft. of water in her after hold. She immediately put back to San Juan Harbor where it was discovered that the leak was caused by a hole in a plate in B. strake on the starboard side about 64 ft. from the stern, and about 7 ft. from the keel. *Johson*, 45; *Bagger*, 42, etc.

On arrival at San Juan it was found there were 13 feet of water in the after hold and a large part of the sugar stowed there was destroyed. To recover for the loss thus incurred this suit was brought.

The Insular Line bill of lading was issued for the sugar in question. *Libelant's Exhibit 12*, 228. It was signed by the agents at Arecibo, April 25, 1912. This bill of lading contained the following exceptions:

> "loss or damage occasioned by causes beyond its control * * * or any latent defect in hull, ma-

> chinery or appurtenances, or by unseaworthiness of the ship, even existing at the time of shipments, or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager." *Libelant's Exhibit 12*, 229.

Since the charter-party was not a demise, *Opinions*, 265, 276, and the charterers were not in position to enable them to exercise diligence to keep the ship seaworthy, it was essential for their protection that they should be entitled to rely upon the express covenants of the ship owners in the charter-party for the maintenance of the ship in a seaworthy condition at the beginning of every voyage on which any cargo should be carried for which the charterers might issue bills of lading. They were not entitled to limit their own liability under the statutes, since they did not man and provision the vessel. If, therefore, in any case liability should attach to the charterers under their bills of lading in consequence of the unseaworthiness of the ship, they would be unable to obtain any relief from such liability, except through the precautions which they took to obtain the owners' personal and express covenant in the charter party to maintain the ship in a seaworthy condition throughout the period of the charter party.

The suit was defended by both the present petitioners and the Insular Line on the grounds, first, that due diligence had been used to make the vessel seaworthy, which constituted a defense under the Harter Act and the bills of lading; and second, that by virtue of a clause to that effect in the bill of lading, they were entitled to the benefit of insurance that had been effected on the goods.

The Insular Line, in addition to the foregoing general defenses, contended that if there was any liability as between the cargo interests on the one hand and the charterer's and vessel's interests on the other, such liability was primarily that of the vessel and her owners, who should respond for the full amount of the damage, and that the charterer should be liable only if execution failed against both vessel and owners. Alternatively the charterer claimed indemnity from the shipowners under the covenant of seaworthiness in the charter party.

The District Court found that the damage had been caused by unseaworthiness of the vessel, due diligence to discover which had not been exercised; that the benefit of insurance clause in the bill of lading did not inure to the benefit of the carrier; that the full amount of the loss was recoverable by the libelant primarily out of the steamer and secondarily out of the Insular Line; and that the present petitioners were not liable beyond the value of their interest in the vessel and pending freight.

The Circuit Court of Appeals adopted the opinion of Judge Hough and was "satisfied that the *Luckenbach* was unseaworthy as the result of gradual corrosion of the plate at a point where there was no cement or where the cement was cracked," *Opinion*, 276, and that the charterers were not protected either by the third section of the Harter Act because the accident was not an error of navigation or management, or by the exception of unseaworthiness in the bill of lading, because due diligence in respect of the condition of the steamer was not exercised. *Opinion*, 276.

With respect to the benefit of insurance the Circuit Court of Appeals considered that the payment of the insurance money was in effect merely a loan and that, therefore, the libelant was entitled to recover in full under *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed., 847; *Bradley* v. *Ry. Co.*, 153 Fed., 350, from which decisions the court stated it was not disposed to depart. *Opinion*, 276.

With respect to the question of limitation of liability, the Circuit Court of Appeals in accordance with the contention of this respondent reversed the decree of the District Court, and held that

> "As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the Benner Line, 217 Fed. Rep., 497, holds that the owner cannot limit his liability against this express contract." *Opinion*, 276.

## Questions Presented in this Court.

Inasmuch as both courts below have made similar findings on the facts, the Insular Line does not deem it proper or necessary to consider in this brief the question of seaworthiness or the testimony on the question of whether or not due diligence was used, all of which has been dealt with sufficiently by the proctors for the petitioners in their brief, *Second Point*. The ship owners have fully presented the facts and circumstances on which they claim that they had used all due diligence to make the ship seaworthy at the inception of the voyage on

which the loss occurred. If the point is well taken the libelant's case fails; if the findings of the court below are held to be right on this point, the effect of the provision that the charterers should have the benefit of any insurance on the goods would remain for consideration, as well as the question of limitation of liability.

This respondent, therefore, will argue these questions of law, and contends as follows:

1. The Circuit Court of Appeals erroneously held that the transaction between the libelant and its insurer was not a payment of insurance and did not inure to the benefit of the carrier under the contract of carriage; and

2. The Circuit Court of Appeals correctly held that for any loss recoverable by the libelant the ship owners are liable for breach of the continuing warranty of seaworthiness in the charter party; and the ship owners are not entitled to limit liability as against the charterer's right of indemnity because the undertaking of the charter party was the owners' personal contract. They claim that such liability should extend not only to the interest of the Estate of Lewis Luckenbach, as held by the Court of Appeals, but also at least to the interest of Edgar F. Luckenbach who personally signed the charter party.

## FIRST POINT

THE CARRIER WAS ENTITLED TO THE BENEFIT OF INSURANCE EFFECTED BY THE LIBELANT.

The sugar in question was shipped under bills of lading which contained a clause that the carrier should have the full benefit of any insurance that may have been effected on account of the goods. Insurance was effected under policies containing a warranty against claims on merchandise shipped under a bill of lading containing a stipulation such as the one above mentioned. When the damage occurred, the libel was filed by counsel for the underwriters and payment of the losses were made under so-called loan receipts.

Although the learned District Judge intimated very strongly his personal view that the contract constituted a payment of insurance, of which the carrier was entitled to the benefit under the bill of lading, he felt constrained by the authority of *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. 847; *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed. 350, and other decisions in the Second Circuit to come to the opposite conclusion. *Opinion*, 244, 245.

The Circuit Court of Appeals affirmed Judge Hough's opinion without any discussion except that the District Court correctly held that under these decisions the clause in the bill of lading did not protect the carrier. *Opinion*, 276.

Irrespective of whether the Burr and Bradley cases were correctly decided, this respondent contends here, as it contended in the Circuit Court of Appeals, that these decisions do not govern the case at bar for reasons which will be considered fully hereafter.

A. BY THE VALID TERMS OF THE CONTRACT OF CARRIAGE THE CARRIER WAS TO RECEIVE THE BENEFIT OF INSURANCE.

The bill of lading constituted the contract of carriage between the shipper or agent of the owner of the property carried and the Insular Line. *Libelants' Exhibit 12*, 228. By clause 9 of this bill of lading, it was agreed that

> "in case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the full benefit of any insurance that may have been effected upon or on account of said goods." *Libelants' Exhibit 12*, 232.

A clause precisely like this one in legal effect, and containing some language exactly similar to it, has been upheld by this Court in *Phoenix Insurance Company* v. *Erie & Western Transportation Company*, 117 U. S. 312. In that case a libel was filed against a carrier by an insurance company which had insured the owners of the cargo and paid them the amount of the insurance. The defense was a clause of the bill of lading similar to the one involved in this case. The Supreme Court held that the provision of the bill of lading was valid and the insurer could not recover because his only right against the carrier was by way of subrogation which gives him only the right which the assured had.

The Court held that the insurer stands in no relation of contract or privity with the carrier and his title arises out of the contract of insurance solely. Therefore, the

right of the insurer against the carrier is subject to all limitations or restrictions of the lawful contract between the owner of the goods and the carrier. The provision for allowing the carrier the benefit of insurance was valid because the carrier himself might have lawfully insured against the loss, even though occasioned by his own negligence. The clause being valid as between the owner and carrier prevents "either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation." P. 325.

The Court considered that its conclusion accorded with *Rintoul* v. *New York Central Railroad*, 21 Blatchford, 439, *Carstairs* v. *Mechanics & Traders Insurance Co.*, 18 Fed., 473, *The Sidney*, 23 Fed., 88, and *Mercantile Insurance Co.* v. *Calebs*, 20 N. Y., 173.

The decisions of the Court of Appeals of New York are in accord. *Mercantile Marine Ins. Co.* v. *Calebs*, *supra*. Later decisions follow that case. *Platt* v. *Richmond &c., R. R. Co.*, 108 N. Y., 358; *Fayerweather* v. *Phoenix Ins. Co.*, 118 N. Y., 324.

Under these authorities the carrier is entitled to the full benefit of any insurance effected on the goods, and the question is narrowed to the issue whether or not the payment received by the W. J. McCahan Sugar Refining Co. from its insurers was such as to fall within the meaning of this clause as construed by the courts.

B. THE TRANSACTION BETWEEN THE LIBELANT AND ITS INSURER OPERATED AS A SETTLEMENT OF INSURANCE, THE BENEFIT OF WHICH INURED TO THE CARRIER.

*1. The Documents*

In the opinion of the District Court, 242-244, Judge Hough stated the facts fully.

The total risk on the cargo was insured as follows:

1/2 by the Federal Insurance Company;
1/8 by the Thames & Mersey Marine Insurance Company;
3/32 by the Aetna Insurance Company;
3/16 by the St. Paul Fire & Marine Insurance Company; and
3/32 by the Manheim Insurance Company.

The policies of the Federal Insurance Company, Thames & Mersey Marine Insurance Company and Aetna Insurance Company contain the following clause:

> "And warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon." *Libelant's Exhibit 1*, 215; *Libelant's Exhibit 6*, 221; *Libelant's Exhibit 8*, 225; *Ogden*, 30.

The policies of the St. Paul Fire & Marine Insurance Company, and the Mannheim Insurance Company, are quoted by Judge Hough in his opinion, 242-243, and are to the same effect.

We refer to and quote the documents and testimony of the Federal Insurance Company because they have the largest interest of any of the insurers, and further because of the stipulation that the transactions in connection with the settlements of the other companies were of similar import. *Ogden*, 30.

In the policy and certificates of the Federal Insurance Company, *Libelant's Exhibits 1, 2, 3* and *4*, 215-219, there was no provision anywhere for a payment of the insurance by a so-called loan or for such a loan receipt as was afterwards executed.

When the insurance was adjusted after the loss, the libelant signed receipts on forms varying according to the insurance company which drew them up. The receipt of the Federal Insurance Company is as follows:

New York, August 15, 1912.

"RECEIVED from the Federal Insurance Company, Twenty-three hundred four and 16/100 dollars, as a loan and payable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about ..... 190.., or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense

and under the exclusive direction and control of the said Federal Insurance Company.

THE W. J. McCAHAN SUGAR REFINING CO.,
R. S. Pomeroy, Treasurer.

$2,304.16

Description of property—Sugar."

*Libelant's Exhibit 5*, 220.

The receipts given to the other insurance companies are in evidence as *Libelant's Exhibits 6, 7, 8 and 9*, 220, 222, 224, 225, 226. One of them is quoted in the opinion.

As the Learned District Judge said, the variations between the different receipts are not of great importance, and "Whether or not bound to do anything by their policies' terms, the receipts all show payments called loans, which the lenders are to get back as best they can by suing somebody at their own expense, but in the name of the insured." *Opinion*, 244.

*2. The "Loan" Transaction*

The testimony shows clearly that the transactions between the libelant and its insurers were not loans in any true sense of the word. The insurers waived any defenses that they may have had under the policies, paid the losses to the assured, without any recourse, and merely took over, by subrogation, its rights against the carrier. The payment was called a "loan," but was not such in fact. *Ogden*, 28-30; *Stipulation*, 30. On this point the testimony of Mr. Ogden is quite clear.

The intent was that unless the insurers suing by their own counsel and at their own expense in the name of McCahan Sugar Refining Company succeeded in this suit, the amount advanced was an absolute payment outside the

scope of the policy. *Ogden*, 28. The amount of money "loaned" or "advanced" was the exact total amount of the insurance and was a full payment of the loss. *Ogden*, 29. Obviously the payment would never have been made if it had not been for the insurance effected. It was admitted that the insurers were liable if the carrier was not. *Ogden*, 28-30; *Stipulation*, 30. As it was not expected that the insurance paid under the receipt should ever be returned to the insurer by the insured, and as there was no recourse against the assured for the amount of the "loan" under any circumstances, the real effect of the transaction was a payment to the assured of the amount of his loss and the sole recourse in respect to that loan was limited to what the insurer might realize in this proceeding. *Ogden*, 30.

The proctors for the libelant were retained by direction of the insurers, *Ogden*, 24, by whom also they are to be paid. *Ogden*, 30.

The whole expense of this suit was to be and has been borne by the underwriters. The object of the suit is to make what recovery is possible for the insurance companies, and the action is for their sole benefit. *Ogden*, 30-31. *Libelant's answers to claimant's interrogatories*, 21, 24. The underwriters are not to be reimbursed if unsuccessful in this suit. *Ogden*, 30.

At the trial, Judge Hough intimated that if the case were at common law, he should have been obliged on these facts to instruct the Jury that the transactions constituted payments under the policies.

If the warranties in the policies had any effect at all, it was to avoid the policies when the libelant accepted the bill of lading with the provision giving the carrier

benefit of insurance, *Carstairs* v. *Mechanics, etc., Ins. Co.*, 18 Fed., 473; *Inman* v. *S. C. Railway Co.*, 129 U. S., 128. Payment of the loss with full knowledge of the facts was a waiver of the warranty. In fact, the warranty was never intended for anything except to be waived. The transaction was intended to be a final settlement with the insured, and operated as such. *Ogden*, 28, 30.

Thus, the insurer is the real party in interest and to the shipper it is entirely immaterial whether there be any recovery or not. The shipper's loss has been paid. Whatever the rights of underwriter and assured might have been if the former had elected to stand on their rights, it is plain that by the time suit was brought the underwriters had paid off the insured, had secured all his rights of action, including the use of his name, and were the sole parties in interest. The situation is, therefore, identical with that in *Phenix Ins. Co.* v. *Erie Co.*, 117 U. S., 312, except that the underwriters are suing in the assured's name instead of in their own. The shipper's position is unaltered whether the carrier be exonerated or held liable. It can hardly be said under these circumstances that the shipper has not received the full benefit of his insurance.

3. *The Transaction Was Merely a Subrogation.*

The position of the shipper who has received a sum of money without any obligation ever to pay it back is not in any sense that of a borrower. The only obligation undertaken by the shipper was that any recovery which the insurers might effect in the name of the shipper from the carrier should be impressed with a trust in favor

of the insurer; but this obligation would arise regardless of the specific provision, for, after payment of insurance, the assured holds any recovery from the carrier as trustee for the insurer. *The St. Johns*, 101 Fed., 469, 473; *Stockton Milling Company* v. *California Navigation & Imp. Co.*, 165 Fed., 356.

The situation here is the ordinary case of subrogation of the insurer to the rights of the insured. Subrogation is imposed by equity where the insured received everything to which he was entitled by his insurance and the right of subrogation accrues to the insurer without any expressed stipulation; and he may assert it in his own name. *Hall & Long* v. *The Railroad Companies*, 13 Wall., 367; *Liverpool, etc., Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397; *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U. S., 312.

While the documents taken by the underwriters against payments of the losses in accordance with the proofs of loss submitted to them have been called loan receipts in each case, they are no different in substance and effect from subrogation receipts, and the rights which the underwriters acquired under them are precisely the rights, and no others, that they would acquire under the doctrine of subrogation. The effect of subrogation, as stated by Lord Blackburn in *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, at p. 339, is that where

> "a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has

> already paid the full indemnity is entitled to be recouped by having that amount back."

To the extent that the underwriter has paid the assured, he is entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss, *Simpson* v. *Thompson*, 3 App. Cas. 279, 284; and, in the exercise of those rights, he may require the assured to give the use of his name for bringing an action and to render all the assistance which is necessary to enable a claim upon a third party to be enforced. *Dufourcet* v. *Bishop*, L. R., 18 Q. B. D., 373.

On an examination of the rights which the underwriters in this case have obtained under the so-called "loan receipts" and the rights which they would have been entitled to from their assured, if they had made outright payments to the assured and had taken the usual subrogation receipts, or had taken no receipts at all, it is seen that the underwriters would have acquired exactly the same rights as against the shippers that they have acquired under the so-called loan receipts and no others. The rights as between themselves and their assured would have been the same; that is to say, in neither case were the underwriters entitled to get back from the private resources of the assured any portion of the payments made to them, and in both cases they would succeed to whatever rights the assured had against the carrier which caused the loss.

It is manifest, therefore, that the so-called loan receipts do not evidence any loan justly so described, but merely secure to the underwriters their ordinary rights of subrogation upon payment, and, since the assured have

not agreed to repay the underwriters anything except out of recoveries, the so-called loan receipts leave the assured in precisely the same position in which they would have been left by a flat payment without any qualification. They also leave the underwriters in the same position. A real loan would not have left either party in the same position as that arising from an actual payment. Hence this kind of a payment is not a loan.

*4. Subrogation Is Limited by the Bill of Lading.*

The contention of the Insular Line in this case cannot be attacked on the ground that the provision of the bill of lading was a fraud or inequitable clog on the right of the insurer to subrogation because the insurer knew all about the provision in the bill of lading at the time the payments were made and the receipts taken. Mr. Ogden, the head of the Loss Department of the Federal Insurance Company which insured half of the risk, *Ogden*, 27, testified that the loan receipt arrangement was outside the scope of the policy, *Ogden*, 28, and that at the time that insurance company took the receipt and paid the loss, it knew that the bill of lading contained the stipulation that the carrier should have the benefit of the insurance. *Ogden*, 29. The other companies had the same knowledge. *Stipulation*, 30.

The situation cannot be summarized better than it was by the learned District Judge.

> "This record contains proof that when a shipper gets insurance he (or his broker) knows that by the policy he pays for, he is left (*pro tanto*) without insurance whenever he accepts a bill of lading requiring him to give the carrier the benefit of his contract, but he is contemporaneously

assured that by a gentleman's agreement, paid for by his premiums, he will receive against usual proofs of loss, the amount he would have gotten had there been no bill of lading, that he will never be called on to pay back any of the money, and that as far as he is concerned his insurance protection is as absolute as though one clause in the policy did not exist because he is assured beforehand that in consideration of his premium that solemn warranty will not be practically enforced.

"To say that a man in this condition is not insured, is nonsense,—any insurance company that refused to make the so-called 'loan' could be successfully sued,—the complaint sounding in fraud and deceit.

"Indeed recourse need not be had to a pleading in *tort*,—for the real contract is not expressed in policy and riders. The actual and enforceable agreement is to pay the loss, provided it be always called a 'loan.'

"To say that what one must pay and does pay, parts with for a consideration, and can never recover from the recipient is a 'loan',—insults understanding". *Opinion*, 244-245.

Nevertheless, the Circuit Court of Appeals held, that:

"Though the purpose of the Insurance Company is quite apparent, we can understand a contract of loan which is to be repaid only on a certain condition, *e. g.*, the shipper's recovering against the carrier." *Opinion*, 276.

In this case, however, the shipper was not bound, and was not asked, to attempt a recovery from the carrier. The insurers themselves undertook, by their own counsel

and at their own expense, the burden of the proceedings to effect such recovery.

The only reasonable interpretation that can be given to the transaction is that there was an intentional relinquishment of the insurer's right under the policy which operated at once and unqualifiedly to the benefit of the assured and which could not be revoked. The agreement constituted a settlement under the policy of insurance and operated as a waiver of its breaches. *Smith* v. *Glens Falls Insurance Company*, 62 N. Y., 85; *Godchaux* v. *Merchants Mutual Insurance Company*, 34 La. Ann. 235, and cases cited. In other words, by making the advance and entering into the agreement the insurer adjusted and paid the loss as between him and the assured, and the whole transaction between them was at an end.

It is in this respect that the present case differs from *Inman* v. *South Carolina Railway Company*, 129 U. S., 128. The decision in that case that the carrier was not entitled to the benefit of insurance under a similar clause, went on the ground that the agreement by which the advance was made to the assured by the insurer *expressly reserved all rights under the policy* and postponed settlement pending determination of the carrier's liability. The insurer did not actually transfer any money and the assured paid interest on such funds as were advanced.

The situation is plainly one wherein the insurer is attempting to secure by an artificial device advantages to which he is not legally entitled. As we have seen in *Phoenix Insurance Company* v. *Erie & Western*, *supra*, if the insurer sought recovery by subrogation, he would be met by the perfectly valid clause in the bill of lading with respect to the benefit of insurance effected on the

goods. Having assumed the risk involved by entering into the so-called loan agreement with full knowledge of all the facts, he should not be allowed to escape the legal consequences of his waiver at the expense of the carrier.

This Court has accepted the principle for which the Insular Line contends in an admiralty suit, *Wager* v. *Providence Insurance Company*, 150 U. S. 99, where Mr. Justice Shiras, at page 108, said:

> "But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phoenix Ins. Co.*, v. *Erie & Western Transportation Co.*, 117 U. S. 312; *St. Louis, Iron Mountain &c., Railway* v. *Commercial Union Insurance Co.*, 139 U. S. 223.
>
> "If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier".

In coming to its conclusion, therefore, in that case, the Court proceeded on the assumption that it had already been decided that the underwriter's right of subrogation is limited by a benefit of insurance clause in the bill of lading.

5. *The Loan Transaction Constituted Payment.*

The inequity of upholding the insurer's transaction here is pointed out in the case of *Roos* v. *Railroad Company*, 199 Pa. St., 378, p. 381, where the court said:

> "If the carrier could be made to bear the whole burden, the insurance company would be entirely relieved from the risk it assumed, and the stipulation in the insurance benefit clause in the shipping receipt would be rendered valueless to the carrier through an unfair combination of the owner and the insurance company, which would be manifestly unjust and unreasonable, as the contract provided that the carrier should pay a just assessment of the damage, and have full benefit of any insurance effected on the goods."

In the *Roos* case, *supra*, where the carrier issued a shipping receipt containing a stipulation to have the full benefits of any insurance effected on the goods, the shipper (insured) negotiated for and received an advance payment, in exchange for a receipt which was couched in terms somewhat similar to the form of agreement here. The trial Judge instructed the jury "if you are of the opinion that the insurance company paid $809 as an adjustment of the loss, but with a string to it, nevertheless it was a payment, and it ought to be deducted out of the

$1,700, and the insurance company, which is in the business of taking risks like this, ought to be held." The jury found that the "loan" was a payment, and the carrier's liability was offset accordingly. The Supreme Court of Pennsylvania affirmed the judgment below.

The construction of the receipt in the *Roos* case was held to be for the court, but there was other testimony admitted bearing on the payment, and all the evidence was considered together. Mr. Ogden's testimony here, cited *supra*, and the stipulation as to the testimony of the other insurers, *Ogden*, 30, leave no ground for doubt but that there was an intentional payment, in fact, however the receipt, standing alone, might be interpreted.

The point also received careful consideration by the Supreme Court of Tennessee in the cases of *Lancaster Mills* v. *Merchants' Cotton-press Company*, 89 Tenn., 1 (5 Pickle), and *Deming* v. *Merchants' Cotton-press Company*, 90 Tenn., 306 (6 Pickle).

In the *Lancaster Mills* case the action was brought by the owner of the goods damaged by fire against the warehouseman in whose custody the goods were when burned, and against the carriers of the goods, to recover for the loss. The warehouseman had contracted with the carrier to whom the goods were to be delivered to insure them, but failed to insure as stipulated. The owner of the goods was covered by insurance on the goods, and received an advance, ostensibly as a loan, for which a receipt was signed by which it was agreed that the amount advanced would be returned, if the carrier should be held liable. The written agreement was substantially in the same form as was used here by the Federal Insurance Company.

The decision turned on the question whether or not the transaction between the owner of the goods and his insurer was a bona fide loan or a payment. It was held to be an adjustment of the loss as between the insured and the insurer, and a payment which precluded recovery from the defendants. The question discussed by the Court concerning the primary liability as between the defendants and the owner's insurer does not lessen the force of the decision on the matter of the payment. As to that point, Judge Lurton, who delivered the opinion of the Court, said at p. 57:

> "We are convinced that the transaction between the Insurance Company of North America and the complainant, and evidenced by this receipt, is in fact and law a payment and satisfaction of the loss sustained by the burning of the cotton."

The *Deming* case grew out of the same occurrence as the *Lancaster Mills* case. The owner of goods received an advance under an agreement setting forth the reasons for the loan in terms designed to reserve the insurer's rights under the policy, pp. 336, 337; but the Court held that the transaction constituted a payment, nevertheless, and that the insurer was thereby estopped to deny that the loss was covered by the policy. *A fortiori* the insured was estopped from denying payment as to third persons, after having received it.

Although these two decisions did not involve a bill of lading clause giving benefit of insurance to the carrier, they squarely support the proposition that moneys advanced under loan receipts like those in the case at bar are payments and not loans.

It has already been noted that in their decisions on this point both the Circuit Court of Appeals and the District Court relied on *Pennsylvania Railroad Company* v. *Burr*, 130 Fed. 847 and *Bradley* v. *Lehigh Valley Railroad Co.*, 153 Fed. 350. It is submitted these decisions do not govern the case at bar and, of course, are not binding on this Court in any event. Both of these cases went on the ground that the evidence showed the transaction was not intended to be an unconditional payment or to be regarded as a payment of the loss.

The decision in *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. 847, is a narrow one going chiefly on the construction of the clauses of the particular instruments involved. The *Roos* case, *supra*, was distinguished because in that case the loan was not provided for in the policy while in the *Burr* case it was. The Court stated, however, that "In the case at bar, we have only two written instruments, and no other evidence bearing upon their construction," and held that the payment was not an adjustment because of the clause in the policy. P. 850. The *Burr* case, therefore, is to be distinguished sharply from the case at bar, because here the "other evidence bearing on their construction" referred to by the Court was actually produced. As Judge Hough says, "these carriers have produced in court the man behind the apparatus of papers,—and Mr. Ogden has naturally told the truth." *Opinion*, 244. In this case, therefore, Mr. Ogden has supplied complete evidence on the construction of the written instruments, the lack of which accounts for the decision in the *Burr* case. The testimony of Mr. Ogden presents the transaction fully, together with the intention of the par-

ties as to the meaning of it, and this case is therefore entirely distinguishable on the facts from the *Burr* case.

The case of *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed., 350, is like the case of *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed., 847, in that it appears to have been decided solely on the documents, though the clauses in the policy and in the bill of lading more nearly resemble those involved in the insurance of the Federal Insurance Company.

The cases cited by the lower court in the *Bradley* case, 145 Fed., 569, in support of the decision are dissimilar on the facts to this case, and were distinguished in the *Roos* case, *supra*, at p. 381.

In the *Bradley* case, at p. 353, Wallace, *J.*, said:

> "Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense."

In the present case, we have the testimony of Mr. Ogden, previously referred to, that the payment was in fact intended to be an "absolute payment" as between

the insured and the assured, *Ogden*, 28; that the company did not require the assured to prosecute an action against the carrier for the recoupment of the underwriter, but that, on the contrary, it employed its own counsel, and is prosecuting the action at its own expense and for its own sole benefit upon the distinct understanding that, if no recovery is effected, there will be no recourse against the assured, either under the policy or the so-called loan receipt. *Answers to Interrogatories*, 21, 24; *Ogden*, 29-31.

In other words, the transaction here is explained by parol; and the receipt, as explained by the testimony, shows that the payment was, in fact, unconditional. The only condition that Mr. Ogden refers to is the condition stated in the receipt itself, that the action is to be prosecuted against the carrier for the recoupment of the underwriter.

That condition, however, was waived, since the assured voluntarily assumed, by its own counsel and at its own expense the prosecution of the suit against the carrier.

The so-called condition adds nothing, under these circumstances, to the right which the insurer would have had without it, since on payment of the loss, the insurer would have had a right by subrogation to prosecute the present suit exactly as it has done, either in the name of the insured or in its own name. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397, and cases cited *supra*.

Judge Wallace, in the extract quoted, says that the parties were at liberty to agree that the payment should be regarded as a loan or gratuity. This is true only if such agreement does not operate to the prejudice or in

fraud of a third party, between whom and the insured there have arisen contract rights. It is inequitable that the insurer and the assured should assert against the carrier a private arrangement in contravention of the contract of the assured with the carrier that the latter should be allowed the benefit of insurance. At the moment of loss the carrier's liability was fixed and one of the conditions of his liability was that he should have the benefit of insurance. The condition attached to the payment, by virtue of which it is alleged to be a loan, that suit be brought for the benefit of the insurer, is void as against the carrier because the assured had no right at the time of payment to contract away from the carrier the benefit agreed on.

The situation is quite similar to questions which arise between successive assignees of legal and equitable rights. The assured assigned to the carrier certain rights and then purported to assign the same rights to the insurer who was fully cognizant of the prior assignment. The analogy is very close to the familiar situation in equity where the second assignee taking with notice of the first assignment is postponed. Pomeroy, *Equity Jurisprudence*, 3rd Ed. §§ 713-715.

An application of this principle to a maritime transaction is found in *Great Lakes & St. L. T. Co.* v. *Scranton Coal Co.*, 239 Fed. 603, 609, where the purchaser of vessels who knew they were chartered and committed to the business of a third party, was subordinated as owner to the third party's prior equitable right to specific performance of the charter.

Another close analogy is that of a purchaser for value of a legal estate who is uniformly held to take subject to prior equities of which he had notice. By the agreement with the insured the insurer took all the rights which the assured had against the carrier, having full notice of the contract by which the relations of the assured and the carrier were governed. He therefore should take subject to any rights of the carrier just as he who acquires a legal estate with notice of prior equity holds the estate subject to this equity. Pomeroy, *Equity Jurisprudence*, 3rd Ed., § 730.

The question may be tested in other ways. Suppose that a double insurance had been effected by the assured, and after loss one of the insurance companies had made payment under the circumstances in evidence in this case. If the assured then attempted to collect again from the second insurance company, it can hardly be contended that he would be allowed to do so on the ground that the transaction with the first company was not a payment but merely a loan.

If in fact it was not a payment to the assured, for the breach of what obligation could the insurance company sue to recover back its loan? It is of the essence of a loan that the lender shall have a right against the borrower for repayment. There was no such right under the evidence in this case and the evidence goes farther and shows that there was not even intended to be any such right. *Ogden*, 28, 30.

Whatever may have been the arrangement in the *Burr* case in which Judge Wallace intimated that the advance by the insurer might be regarded as a gratuity, it cannot so be regarded in this case. Everyone knows that a pay-

ment of any such sum as was transferred by the insurers to the assured in this case did not constitute a gratuity or anything like it, but was a business transaction pure and simple for which a *quid pro quo* was received and it is quite evident from the record that the insurance in the first instance and the premiums paid under it were such *quid pro quo*.

The question of gratuity arose in *Burnand* v. *Rodocanachi*, 7 A. C., 333, where the insurers having paid the loss on a valued policy attempted to recover from the assured compensation which the latter had received from the United States. The loss was on cargo destroyed by the *Alabama*. The United States created a compensation fund under which the assured received the difference between the loss actually suffered and the insurance. The House of Lords held that the underwriters were not entitled to this compensation because it was received as a gratuity, and not as anything to which they were entitled as of right.

The case further illustrates the doctrine of subrogation and shows that in this case the underwriters, since their right is only that of the assured, cannot recover against the carrier because of the benefit of insurance clause in the bill of lading; but the case is cited here as an instance of real gratuity, where money is turned over neither in performance of a preexisting obligation nor as consideration for a present or future obligation.

If the payment be regarded as a mere gratuity, then the insurers are not subrogated at all. In an action against the carriers where the insurers paid the loss voluntarily and not in accordance with any right of the assured, they were not subrogated to the right of the in-

sured. *Mercantile Mutual Ins. Co. v. Calebs*, 20 N. Y., 173. At page 177 the Court said:

> "The contract between them and the insured was made before any insurance was obtained, and though it sought to secure a right to the defendants in case policies were procured, yet on their part no fraud was contemplated on the plaintiffs: none is found by the court. It is true the case states that the plaintiffs did not know of the contract when they issued their policies: that that was a matter between them and the insured. If there was any fraudulent concealment of facts on the part of the latter, at the time they obtained their insurances, it would have avoided the policies and they would not have been bound to pay the loss. If they paid it voluntarily, they are not entitled to be subrogated. (*Wilson v. Harper, 1 Comst.*, 586)."

Whether or not the payment made was actually unconditional or not, was primarily a question of fact to be determined on the evidence by the trial Court. Judge Hough, found that on the facts here proved, the payment was unconditional. The Circuit Court of Appeals did not actually reverse that finding of fact and yet held on the authority of two cases, which it is submitted do not apply to these facts, that the carrier should not have the benefit of the shipper's insurance.

The charterer, in so far as it may be affected, submits that the decision of the Circuit Court of Appeals on this point was erroneous and should be reversed.

## SECOND POINT

THE SHIPOWNERS ARE BOUND TO INDEMNIFY THE CHARTERER IN RESPECT OF ANY AND ALL LOSS RECOVERABLE BY CARGO ON ACCOUNT OF UNSEAWORTHINESS.

Reversing the decree of the District Court, the Circuit Court of Appeals held that:

> "As between the charterers and the owners, the latter are under an express obligation to maintain the steamer in a seaworthy condition. It is not fulfilled by her being seaworthy at the beginning of the charter or of any voyage under the charter. Our decision in the Benner Line, 217 Fed. Rep. 497, holds that the owner cannot limit his liability against this express contract." *Opinion*, 276.

The Circuit Court of Appeals correctly concluded that any damages recoverable by the libelant should be paid primarily out of the steamer and her owner the Estate of Luckenbach, but should have held Edgar F. Luckenbach also primarily liable as a part owner.

A. THE RESPONSIBILITY FOR UNSEAWORTHINESS SHOULD REST ON THE SHIPOWNERS BECAUSE THEY WARRANTED THAT THEIR VESSEL WAS SEAWORTHY AND THAT THEY WOULD MAINTAIN HER IN THAT CONDITION.

It is clear the damage was not caused by grounding in an improper berth furnished by the charterer or on account of any fault attributable to the charterer. *Opinion*, 241.

The theory advanced by the petitioners in the second point of their brief that the hole was caused by some

hard substance penetrating the impaired plate while the *Julia Luckenbach* was loading at San Juan is on the face of it highly improbable. This pure conjecture, unsupported by any direct evidence and disregarded by both Courts below, should not be considered at this time.

Furthermore, the evidence shows that if the owners had any objection to the berth assigned to the *Julia Luckenbach*, they waived it. *Atkins* v. *Fibre Disintegrating Company*, 2 Ben. 381, Fed. Cas. No. 601; affirmed 18 Wall. 272, 299. Even if the conditions were unknown at the time the berth was assigned, the owners could not escape liability for the reason that the master permitted the loading to continue after he claimed to have known that the ship was on the bottom. *Panama R. R.* v. *Napier Shipping Co.*, 166 U. S. 280, 288; *Constantine & Pickering S. S. Co.* v. *West India S. S. Co.*, 199 Fed. 964, 968.

Both courts below having found in effect, that the damage did not arise from any *actual* fault of the charterer, further discussion of the point appears to be unnecessary.

If the libelant is entitled to recover at all, therefore, the recovery should run against the ship. The ship is hypothecated to the shipper and the decree should move directly against her. *The Alert*, 61 Fed., 113. *The New York*, 93 Fed., 495.

If it be considered that the ship owner did not use due diligence to make the vessel in all respects seaworthy, or if, in fact, she was not seaworthy, and as a result of want of diligence or unseaworthiness the charterer incurred a liability, the owner should indemnify the charterer for the failure to have and maintain a seaworthy ship according to his personal contract with the charterer.

It is well settled that under such circumstances, if there is any liability, it is on the ship and her owners. *The Presque Isle*, 140 Fed. 202. *Church Cooperage Co.* v. *Pinckney*, 170 Fed. 266, and cases cited.

The shipowners themselves have put this construction on the charter-party by taking steps to maintain the ship in a seaworthy condition during the period of the charter. *Luckenbach*, 85. They repaired the ship after she had suffered a damage in collision with the steamer *Horatius* in January, 1912, three months before the accident. *Luckenbach*, 85. There was evidence of examinations of certain parts of the ship by the crew preliminary to loading. *Knudsen*, 101; *Rodick*, 129; *Haley*, 158, 159; *Little*, 182, etc. The owners maintained in the District Court and have argued in their brief that the care exercised by them in order to maintain the ship in a seaworthy condition satisfied the obligation which they assumed to be upon them to have the vessel in a seaworthy condition at the beginning of the voyage in question. The officers and engineers all testified that in fact she was in seaworthy condition up to the time she left the quartermaster's dock in San Juan. *Rodick*, 127-129; *Haley*, 159; *Little*, 182, etc. Whether this be so or not it shows the owners' interpretation of their obligation under the charter-party and their anxiety to prove that they had discharged it.

Judge Hough found that such a condition in the bottom of the *Julia Luckenbach*, as existed there at the time of the damage, required at least two years to produce, *Opinion*, 241-2; *Martin*, 96, and this finding was speci-

fically approved by the Circuit Court of Appeals which added, "We are satisfied that the *Julia Luckenbach* was unseaworthy as the result of gradual corrosion of the plate at a point where there was no cement or where the cement was cracked." *Opinion*, 276.

It seems, therefore, that the condition in the *Luckenbach's* bottom certainly did not result from the carriage of sugar on this particular voyage, or on voyages since she entered on the existing charter, only nine or ten months before the accident. A defect in the cement must necessarily have existed before any corrosion or deterioration of the iron bottom could commence.

Contrary to the contention in the petitioners' brief the presumption and fair inference from the evidence, therefore, is that the owners committed a breach of the warranty of the charter party that the *Julia Luckenbach* was "on her delivery, tight, staunch, strong and in every way fitted for the service". *Claimant's Exhibit C*, 234.

The facts as found in both the lower courts would therefore seem to indicate that the vessel was unseaworthy on delivery under the charter party, as well as at the inception of the voyage in question.

*1. The Charter Party Contained an Express Warranty of Seaworthiness.*

The charterer's position, however, does not depend on this finding because the charter party before this Court contains an *express* warranty of seaworthiness extending through the whole period of the charter. Clause 1 of the charter party provides that the owners "shall * * * maintain her in a thoroughly efficient

state in hull and machinery for and during the service." *Claimant's Exhibit C*, 234.

It should be observed this clause does not provide that the owners shall *pay* for the maintenance of the vessel in a thoroughly efficient state but places on them directly the *duty* of actually so maintaining her. The meaning of this clause is made more clear by comparing its language with the provisions immediately preceding, in each of which the owners are required only to "pay" for various charges.

The reason why this covenant by the owners is inserted in a charter party of this kind is that since the charter is not a demise and as the charterer is not owner *pro hac vice* he has nothing to do with the repair and maintenance of the vessel, which are matters over which he has no control. As he is liable without limitation to shippers, whose cargo he contracts to carry, for his own protection he necessarily requires a covenant or agreement by the owners, without limitation, to maintain the vessel in a seaworthy condition throughout the service. This important business consideration was recognized in effect by the Circuit Court of Appeals. *Opinion*, 276.

2. *The Warranty of Seaworthiness Extended Throughout the Service.*

The charterer contends that this case is governed by *Benner Line* v. *Pendleton*, 217 Fed. 497, affirmed by this Court, 246 U. S. 353, and other cases which will be taken up under the next subdivision of this point.

In their brief, the petitioners have sought to distinguish the *Benner Line* case because there the loss was

found to have resulted from unseaworthiness existing when the steamer entered on the charter party, and they rely on the theory of the District Court that the original warranty of seaworthiness had been exhausted as between the petitioners and the Insular Line, long before this damage occurred. *Petitioners' Brief, Third Point, Subdivision D.*

After indicating strongly his dissent from the *Benner Line* case as reported in 217 Fed. 497, Judge Hough in his opinion in the District Court, endeavored to distinguish the doctrine that an owner cannot limit his liability on a personal contract on the ground that it relates to a warranty of seaworthiness at the inception of the charter and not to a continuing warranty. The theory of the District Court now relied on by the petitioners in their brief, apparently goes on the ground that it is unreasonable to hold a shipowner to a personal undertaking to maintain his vessel in a seaworthy condition because such undertaking may cover a long period of time. *Opinion*, 265-266.

This theory of the petitioners amounts to this: that under a voyage charter, the personal obligation of a shipowner requires him to make the ship seaworthy for the chartered voyage but that if the charter is on a time basis for a period to include a number of voyages, he need make the ship seaworthy for the first one of the voyages only. If this distinction exists, what does the clause binding the owner to maintain the ship in a seaworthy condition throughout the service mean? To what does it bind the owner? It is submitted this distinction is a wholly unjustifiable one, not based on controlling authority.

In the opinions of the Circuit Court of Appeals and the District Court and in the briefs of counsel, there appears to be but one case which suggests that the clause in question should be construed in any way but as a continuing warranty of seaworthiness, and that one case did not consider whether or not such a covenant was a personal contract of the owner. Yet, the petitioners ask for a reversal on the authority of that case, *Giertsen* v. *Turnbull* (1907-1908), Sess. Cas. 1101, on which the District Court also relied in holding that "at the time of voyage begun, therefore, the warranty of seaworthiness of the *Julia Luckenbach* had (as between charterers and owners) been exhausted; and there was no contract between them by which owners bound themselves absolutely to maintain seaworthiness * * *." *Opinion*, 266.

The foregoing statement is in flat contradiction of the very words of Clause 1 of the charter party, which states "that the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the services." *Claimant's Exhibit C*, 234.

*Giertsen v. Turnbull, supra*, did not necessarily involve the point in question. The passage in the opinion to which the District Judge referred, is a *dictum* only and is unsound in principle.

In the *Giertsen* case, the steamship *Bauta* had been chartered for a period of six months from September, 1905, under a time charter providing that the vessel should be seaworthy on delivery; and that the owners were bound to "provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service."

Section 12 of the charter provided in what is known as the "Breakdown Clause" as follows:

> "That in the event of the loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, etc., occurred, until she be again in an efficient state to resume her service."

On an outward voyage to Jaffa in ballast to load a cargo, a peculiar sound was heard, which was entered in the engine-room log book as a violent shock in the engine-room. The master attributed the sound to the propeller having struck some wreckage, but experts examined agreed that such noises were attributable to a variety of causes, such as a slackening of bolts, presence of water in the cylinders, or some derangement in the machinery. The steamer continued, however, to maintain her ordinary speed of from eight to nine knots under favorable conditions.

On November 17, the steamer began loading cargo at Jaffa. The engineer made as thorough an examination of the engine as was possible at Jaffa, but was unable to sight the propeller or propeller shaft.

On November 20, the vessel sailed from Jaffa for Valencia. Shortly after sailing, a knocking was again heard, which continued through the 23rd, when a coupling bolt was found to be out of order and a new one was inserted. Knocking continued throughout the 24th and 25th, but on the 26th the vessel apparently proceeded under full speed and steady high pressure.

On the 28th, the engines were stopped in order that a new bolt might be put in the crank shaft. While the ship was stopped for this purpose, further examination satisfied the engineer that the propeller was loose on the shaft. It was then decided to make for the nearest port under slow speed. On the 30th, the vessel reached Bona. It was there ascertained that the shafting had got out of line, and that the white metal stern bush had become worn down to a dangerous extent. On account of the necessity of making repairs and renewing the stern bushing which had worn away, the cargo was transshipped and forwarded by another vessel.

The sole controversy in the case related to the length of time for which the charterers were entitled to make a deduction from hire under the "Breakdown Clause", on account of breakdown of machinery, and the responsibility for the cost of coals consumed during the period the vessel was off hire.

There was no controversy in the court of first instance on the subject of the seaworthiness of the ship. The charterers claimed in that Court to deduct hire from the 14th of November, when the knocking was first heard, prior to the arrival of the ship at Jaffa. The lower court overruled that contention, and held that, as the vessel made substantially full speed up to the 28th of November, when the propeller was found to be loose on the shaft, the deduction from hire under the breakdown clause must begin on that date. P. 1105.

On appeal to the Court of Sessions, the charterers changed their theory somewhat, and claimed that the vessel was unseaworthy on leaving Jaffa, that the owners thereby committed a breach of their contract, and

that hire should be deducted from that date, namely, November 20th. The Court of Sessions made no finding as to whether the vessel was or was not unseaworthy on sailing from Jaffa, and in the end affirmed the judgment of the lower court.

In the course of the opinion, Lord Ardwall referred to *The Vortigern* [1899], P. 140, which had ruled that the warranty of seaworthiness is continuous and applies at the beginning of different stages of a round voyage, and made these observations upon it:

> "But it is plain from the opinions delivered in that case that it is only with reference to supplies of coal that a ship must be put in a seaworthy condition at the commencement of each stage of a voyage." P. 1109.

And he added further,

> "That the implied warranty of seaworthiness was complied with when the vessel was handed over to the charterers in a seaworthy condition at the commencement of the period of hiring and that the maintenance clause in article 1 of the charter-party is inserted merely for the purpose of laying upon the owners the burden and the expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including of course the expense of all necessary and proper repairs." P. 1110.

These statements are unnecessary to the decison and are merely *dicta*.

The Court of Sessions entirely misconceived the effect of the opinion in *The Vortigern*, and misapplied the principle which it embodies.

The controversy in *The Vortigern* did not arise under a time charter-party. It arose under an affreightment charter for a single voyage from Manila or Cebu to Liverpool. The voyage was divided up into stages, on one of which the steamer ran short of coal, in consequence of which a part of the cargo was burned. The ruling was that the plaintiffs were entitled to recover for the lost cargo on the ground that the owners were bound to "make their vessel seaworthy at the commencement of each stage for the voyage or stage of the voyage she then enters upon." The passage in the opinion to which Lord Ardwall apparently referred is in the judgment of Lord Justice A. L. Smith, at p. 152, where he said:

> "It cannot be denied that the implied warranty which *prima facie* attaches to a *charter-party such as the present** is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that the vessel shall then be in a fit state as to repairs, equipment, and crew, and in all other respects, sufficient to take her in ordinary circumstances to her port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage."

The Lord Justice was there applying to an affreightment charter the ordinary doctrine which has received approval in this country in the case of *The Guadeloupe*, 92 Fed., 670, by Judge Brown, and by the Court of Appeals for the Second Circuit, in the case of *United States* v. *New York & O. S.S. Co.*, 216 Fed. 61, 71, 72.

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* The Italics are ours.

That doctrine, however, which is applied simply to a contract for a single voyage, has no relation to a charter for a series of voyages, or for a period of time which may cover a series of voyages, especially where there is an agreement on the part of the owner to maintain the ship in a seaworthy condition throughout the period of the charter.

The Circuit Court of Appeals for the Second Circuit pointed out the difference between the effect of the warranty in the two classes of cases in *The Burma*, 187 Fed. 94, where, in considering the case of *McFadden* v. *Blue Star Line* [1905], 1 K. B. 697, which states the general doctrine that a warranty of seaworthiness is a warranty only as to the condition of the ship at the time of loading, Ward, *J.*, said, p. 97:

> "The covenant in that case was as to the condition of the vessel at the time of loading and was not continuous *as is the one now under consideration.*"

A similar conclusion was reached in *Whipple* v. *Mississippi &c. Co.*, 34 Fed. 54.

Even in *The Vortigern* case, the Court did not differentiate between the liability of the owners of the ship for seaworthiness as respects coal or seaworthiness of the ship itself, even on such a voyage as was there under discussion. The point of the decision was that, if the shipowner does not undertake at the beginning of the voyage to make the ship seaworthy for the whole voyage but only for a certain stage of the voyage, his obligation of seaworthiness continues throughout the different stages, and he is bound to make her seaworthy at the

commencement of each stage, and this applies to the ship *qua* ship, as well as to matters of equipment or coals. See the opinion, A. L. Smith, *L. J.*, at p. 156. Collins, *L. J.*, at pp. 159-160, sums up the position as follows:

> "To come to the case before us, it is obvious that the convenience of both parties required that the adventure should be carried out by a steamer, and that it was not reasonably possible for the steamer in question to take coals enough, in addition to her cargo, to carry the vessel to her ultimate destination at a reasonable rate of consumption for a vessel of her class. It is obvious, therefore, that the common purpose could not be reasonably carried out unless the vessel's stock of coal should be from time to time replenished. The warranty of seaworthiness, therefore, must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage. The voyage, therefore, for this purpose must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly. It follows that the warranty must cover a condition that the vessel shall, at the commencement of each stage, be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative —that is to say, varying according to the standard reasonably applicable to the contemplated conditions.
>
> "Following the process of evolution through which modern commerce has passed, the warranty must be made to conform to modern exigencies— that is, to the rules of convenience which regulate the practice of merchants in respect of par-

ticular voyages. To say, as counsel for the appellants contended, that the warranty is limited to the first stage, and is satisfied if the vessel is fit to perform it, is, as it seems to me, to ignore the principles out of which the doctrine of stages was evolved, and to accept it partially only and not in its entirety. The doctrine of stages involves a recurring obligation to bring the vessel up to the required standard at each stage. It cannot be accepted with an illogical limitation. It must be accepted altogether or not at all * * * It follows that, whether Colombo to Suez or to Port Said is regarded as the second stage in the contemplated voyage, the warranty of seaworthiness as to coal supply was not complied with—to which, of course, negligence, though excepted, is no answer—and therefore that the shipowners are liable to make good the value of the copra consumed by reason of the breach of warranty."

In the case of a time charter, the obligation of the owner is either to have the vessel in such condition at the time of delivery that she will remain seaworthy for the entire period of the charter or to have her seaworthy when she sails from any port on a voyage under the charter party. If as Judge Hough said, *Giertsen* v. *Turnbull*, holds that a series of voyages under time charter does not come within the stages-of-voyage doctrine, the case must then mean that the owner is not allowed to break up his obligation into stages but warrants at the time of delivery seaworthiness through the period of the charter whenever she sails from any port.

In *Thin* v. *Richards & Co.* [1892] 2 Q. B., 141, a vessel was let under time charter to proceed to Oran and

there load, with liberty to fill up with ore or other heavy cargo, then to proceed and deliver the cargo at Garston. She loaded esparto at Oran and proceeded to Huelva to load ore. On sailing from Huelva the steamer had insufficient coal on board, as the result of which she stranded and was lost. The Court held the owners liable to the charterers for breach of the absolute warranty of seaworthiness even if the stages-of-voyage doctrine is applied. Fry, *L. J.*, said, at p. 144:

> "The voyage from Oran to Garston was either an undivided voyage or it was a voyage in stages. In the former case it would be necessary that the vessel should be seaworthy at Oran for the whole voyage. In the second case she must be seaworthy at the commencement of each stage and therefore seaworthy when she left Huelva. In either case the warranty of seaworthiness has been broken. It is just and right that the plaintiff should be entitled to recover, for the law imposes a warranty of seaworthiness for the entire voyage contemplated by the parties, and the shipowner ought not to be able to escape from this liability by dividing the voyage into stages."

In the District Court Judge Hough cited the following passage from *Giertsen* v. *Turnbull, Opinion*, 266:

> "The implied warranty of seaworthiness was complied with when the vessel was handed over to the charterer in a seaworthy condition at the commencement of the period of hire, and that the maintenance clause of the charter party is inserted merely for the purpose of laying upon the owners the burden and expense of maintaining the vessel during the period of hire in a

thoroughly efficient state, including, of course, the expense of all necessary repairs."

In this extract it is said that the maintenance clause of the charter party is inserted merely for the purpose of laying on the owners the burden and expense of maintaining the vessel during the period of the charter in a thoroughly efficient state. The learned District Judge appears to have ignored the word "burden." Construing the maintenance clause most favorably to the owner, this extract does not relieve him from the *burden*, as well as the expense, of keeping the vessel seaworthy.

In fact in a much stronger case Judge Hough held the burden is on the owners to have sufficient coal on board although the charter party contains a clause requiring the charterer "to provide and pay for all coals." *British and Foreign Marine Insurance Co.* v. *Kilgour Steamship Co.*, 184 Fed., 174.

In that case the *Dunkeld* was time chartered to Munson, delivery at Puerto Padre. The charter contained the same warranties as in this case. She was delivered under the charter at that place. The first stage of her voyage was from there to Antilla, Cuba. At Antilla she loaded further cargo and cleared for New York. She sailed from Antilla with an insufficient coal supply, and in attempting to make a coaling port she was obliged to burn part of her cargo and to incur salvage expenses as the result of stranding. The owners of the cargo sued the shipowners and the charterers. The Court held the shipowners for the cargo damage and salvage expenses.

Judge Hough held that the insufficient coal supply made the vessel unseaworthy and that the failure of the master to secure sufficient coal was the fault of the owner. In other words, that although the charter party required the charterer "to provide and pay for all coal" it was the duty of the owner to see to it that the vessel was seaworthy with respect to coal, before allowing her to go to sea. Although Judge Hough found as a fact that the master concealed the insufficiency of the coal supply, he held this to be immaterial because if he had merely remained inactive, the owners would be liable just the same, on the authority of *McIver & Co.* v. *Tate Steamers, Ltd.* [1903] 1 K. B., 362, and *Park* v. *Duncan*, 25 Scs., Cas. 528.

In *McIver & Co.* v. *Tate Steamers, Ltd.*, the doctrine of seaworthiness in respect of coal supply was applied as between the owner and a charterer under a time charter-party in the usual form. The defendants let their steamer on time charter to the plaintiffs for one round voyage from Liverpool to the River Plate and back to the United Kingdom, the vessel—

> "being on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service * * * and to be so maintained during the continuance of this charter party * * * the owners shall provide and pay for all provisions * * * and maintain her in a thoroughly efficient state in hull and machinery for and during the service; 2. that the charterers shall provide and pay for all the coal * * *."

When the vessel started on the return voyage from the River Plate, a sufficient quantity of coal for the voyage was not on board by reason of which she was obliged to put in to Pernambuco and secure coal at a higher rate and to incur delay. At the trial the Judge gave judgment for the plaintiffs on the ground that the provisions of the charter party did not relieve the defendants from the obligation to see that the ship was seaworthy.

The Court of Appeal dismissed the appeal and overruled the contention of the charterers that Clause 2, requiring the charterer to provide and pay for the necessary coal, relieved the ship owners from the obligation to see that the vessel was seaworthy when she first started and at each succeeding stage of the round voyage.

Vaughan Williams, *L. J.*, said at page 365:

> "I cannot see anything in the terms of the charter party to relieve the shipowners from the obligation that would ordinarily be imposed upon them in this respect."

*Park* v. *Duncan*, 25 Sess. Cas., 528, also was a suit on a time charter party by which the steamship *Progress* was hired for three months, delivery at Sunderland, "she being then tight, staunch, strong and every way fitted for the service * * * owners shall * * * maintain her in a thoroughly efficient state in hull and machinery for the service." It provided also that the charterers should provide and pay for all coal. While under this charter, and some months after delivery, the *Progress* sailed from Hamburg with insufficient coal as a result of which she was obliged to pay salvage. The

Court held that as the salvage was necessary as a result of unseaworthiness in not having sufficient coal aboard, it is for account of the owners; and said at page 540:

> "The vessel was unseaworthy when she set out on the voyage and that is a breach of the conditions of the charter party."

The Court continued at page 548:

> "They were bound under this charter party to supply a seaworthy vessel *and to maintain her so throughout its currency, and if they fail so to do, they are responsible for all the consequences of the failure.*"*

The Court also held that unless there was in the charter party a specific exemption of the owners from liability for unseaworthiness,

> "in a time charter the shipowners must be held to undertake that their ship is seaworthy on leaving each place where the master has an opportunity *to refit* or refurnish the vessel. If a vessel is sent to sea not properly supplied with coals it is not seaworthy." P. 548.

As the Court of Sessions decided *Park* v. *Duncan* in 1898, and *Giertsen* v. *Turnbull* in 1908, it appears that the law of Scotland is that the shipowner must have his vessel seaworthy on sailing on every voyage under a time charter, unless the earlier case has been overruled by *Giertsen* v. *Turnbull*. It would seem that if the Court of Sessions in 1908 intended to upset the doctrine of *Park* v. *Duncan*, it would have discussed that case or at

* The italics are ours.

least would have referred to it in its opinion. *Park* v. *Duncan* was not mentioned and can scarcely be regarded as overruled because the requirement of seaworthiness laid down in that case was not directly involved in *Giertsen* v. *Turnbull*. The language which Judge Hough thought justified his position that the warranty of seaworthiness is exhausted on delivery of the vessel in good condition was not necessary to the decision. It was not necessary to the decision in *Giertsen* v. *Turnbull* to hold that the owners of a vessel need not have her seaworthy at the beginning of each voyage under a time charter, but only that the vessel is not off hire on account of breakdown until such time as she ceases to be efficient for the purpose of the charterer, even though she may have been technically unseaworthy at some earlier date.

In the extracts from the opinion in the District Court quoted under subdivision D, in the third point of the petitioner's brief, Judge Hough said that *Giertsen* v. *Turnbull* had been accepted by Scrutton and Carver without comment. *Opinion*, 266. It should be observed, however, that Scrutton cites both *Parker* v. *Duncan* and *Giertsen* v. *Turnbull* in a footnote that "there is a continuing warranty of seaworthiness under a time charter at each stage". Scrutton, *Charter Parties*, 8th ed., p. 86, note (f). This foot-note refers to a proposition in the text that a time charter includes an undertaking of seaworthiness at the beginning of the time of the charter. The learned author explains *Giertsen* v. *Turnbull* in note (i) on page 341 of the 8th edition, and it seems very unlikely that if he considered anything in *Giertsen* v. *Turnbull* overruled the doctrine of *Parker* v. *Duncan*, he

would have passed it over without a specific statement to that effect.

The reference to *Giertsen* v. *Turnbull* in Carver, *Carriage by Sea*, was not made by the learned author himself in his own final edition but was added after the author's death by subsequent editors.

The *dictum* in the *Giertsen* case and the ruling of Hough, *J.*, in the District Court in this case is at variance with the established doctrine of seaworthiness as laid down both in the English law and in our own.

The general principle is that the ship owner must provide a seaworthy ship whenever she sails on a voyage, and it is not sufficient that she be seaworthy on delivery to the charterer. The commencement of the voyage is the time of cleavage in contracts of both insurance and affreightment. Thus in *Steel* v. *State Line Steamship Co.*, 3 A. C., 72, the House of Lords sent back the case for a rehearing because the jury did not find whether or not the vessel was seaworthy *on sailing*. See also *Greenock Steamship Co.* v. *Maritime Insurance Co.*, 9 Com. Cas., 41.

Again it is not sufficient that the vessel be seaworthy when loading is started, but she must be seaworthy when she breaks ground for the voyage, and if she becomes unseaworthy while loading the owners are liable. *Cohn* v. *Davidson*, 2 Q. B. D., 455; *Sumner* v. *Caswell*, 20 Fed., 249; *The Eugene Vesta*, 28 Fed., 762, 764; *Bowring* v. *Thebaud*, 56 Fed., 520, decided by this Court in 1892; Carver *Carriage by Sea*, § 21.

In *Cohn* v. *Davidson, supra*, it was contended that since the vessel was admittedly seaworthy when she pro-

ceeded to the loading berth, the warranty attached and was exhausted, which is the same proposition supported by Judge Hough. This contention was overruled by the upper court which held that the object of the warranty of seaworthiness requires a vessel to be seaworthy at the time she sailed on the voyage. The warranty will not be complied with by seaworthiness any time anterior to sailing.

By the same reasoning under a time charter the warranty of seaworthiness and the obligation of the owner to maintain the vessel in that condition is satisfied only by having her in seaworthy condition when she sails not only on the first, but every subsequent voyage or stage of voyage under the charter party. This doctrine is involved in *British and Foreign Marine Insurance Company* v. *Kilgour Steamship Co.*; *McIver & Company* v. *Tate Steamers, Ltd.*, and other cases cited *supra*, where the instrument in suit was a time charter.

In *Putnam* v. *Wood*, 3 Mass. 481, the plaintiff shipped on the defendant's brig a sum of money with which a cargo was to be bought in the East Indies and carried back to Massachusetts. The defendant was to have a share in the profits in lieu of freight. She sustained some damage between the second and third port at which she touched. After repairs were made at the third port, she loaded the cargo which had been purchased, but was obliged to discharge it on discovery of a serious leak. There was not any lack of diligence in finding the leak or dealing with it. It was argued that as the contract between the plaintiff and the defendant was for one round voyage, the defendant had discharged

his obligation by having the vessel seaworthy at the beginning of the round voyage. But the Court held *contra* and found the defendant was liable because:

> "It is the duty of the owner of a ship, when he charters her, or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety; and *he is to keep her in that condition,** unless prevented by perils of the sea or unavoidable accident." P. 484.

In *Whipple* v. *Mississippi & Yazoo Packet Co.*, 34 Fed., 54, a libel was brought for balance of hire under a charter party by which the captain had agreed to take the vessel to Vicksburg and employ her in the service of the charterer for five months. The charter party contained a guarantee that the vessel should have a certificate of seaworthiness. The vessel did have such a certificate when she was delivered to the charterer and was employed in his business for about a month and a half. The certificate was then revoked whereupon the charterer refused to employ the vessel further or to pay hire. The libelant contended that the guarantee extended only to the time she went into the service of the charterer. The respondents resisted the suit on the ground that it was a continuing guarantee which had been broken. The Court held with the respondent that the guarantee was not fulfilled by compliance with it on delivery because it was a continuing one. The ruling accords with the decision in *The Burma*, 187 Fed. 94, 97.

The conclusion of the District Judge, which the petitioners seek to re-establish, seems to ignore not only the

* The italics are ours.

express covenant in clause 1 of the charter-party, that the owner shall "maintain her (steamer) in a thoroughly efficient state in hull and machinery for and during the service," *Claimants' Exhibit C*, 234, but also section 23 of the charter-party under which it was mutually agreed "that this charter is subject to all the terms and provisions of * * * the Act of Congress of the United States approved on the 13th of February, 1893, entitled 'An Act Relating to the Navigation of Vessels, etc.'" *Claimants' Exhibit C*, 237. The effect of the latter provision is to impose upon the owners and the charterer as between themselves the liabilities that would ordinarily exist between a shipowner and a shipper under the statute. It recognizes that the obligation imposed by section 2 of the Act, that the owner must make the ship seaworthy and capable of performing her intended voyages should apply throughout the charter-party, and that, as provided in clause 3, the owner should not be exonerated from responsibility for losses arising from seawater unless due diligence has been exercised to make the ship seaworthy. *The Wilderoft*, 201 U. S. 378, 388-389.

The construction of clause 23, in conjunction with clause 1, evinces a clear intention that the ordinary rule of seaworthiness should apply as between owners and charterers to every voyage on which the ship might be engaged throughout the period of the charter-party.

If, as the Circuit Court of Appeals correctly held, the owners' warranty of seaworthiness was not exhausted before the loss occurred, it remains to be considered whether or not there is a right of limitation of the liability caused by the breach of that warranty.

B. THE OWNERS OF THE STEAMER CANNOT LIMIT THEIR LIABILITY TO THE VALUE OF THE STEAMER AND HER PENDING FREIGHT AS AGAINST THE CHARTERERS' CLAIM FOR INDEMNITY BECAUSE THEIR LIABILITY IS BASED ON A PERSONAL CONTRACT.

*1. The Charter Party Was a Personal Contract of the Owner.*

It is admitted in the answer of the claimant to the petition of the Insular Line that Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach was the owner of 54/80 of the steamship *Julia Luckenbach*, Edgar F. Luckenbach, individually was the owner of 10/80, and the executors of the estate of Edward F. Luckenbach of 16/80; and that Edgar F. Luckenbach acted for all the owners of the steamship in chartering her to the Insular Line. *Pleadings*, 9, 10, 22. Mr. Luckenbach testified to the same effect. *Luckenbach*, 8, 255.

In the opinion of the District Court, Judge Hough quoted the signature to the charter party and specifically dealt with the case on an admission by claimants' counsel as though there were but one owner who had personally signed the contract. *Opinion*, 261. This finding was not disturbed by the Circuit Court of Appeals and, indeed, the treatment of the case on this basis does not seem to have been objected to by any of the parties.

If there were any doubt about Mr. Luckenbach having assumed a personal obligation, it should be settled by his testimony when he was examined on the motion to limit liability.

> "Q. You are aware that in the charter party which you signed, you agreed, on behalf of your-

> self and the other owners, to maintain the ship in an efficient condition as to hull and machinery throughout the service?
>
> Mr. Carter, I object to that question. * * * A. Yes." *Luckenbach*, 255.

The present case, therefore, is one where the managing owner of the vessel personally negotiated and signed a contract, as the District Judge correctly held, in which it was provided not only that the vessel should on her delivery be tight, staunch, seaworthy, etc., but also that she should be so maintained throughout the period of the charter party and in which were incorporated the provisions of the Harter Act dealing with the same subject. As this Court said in *Pendleton* v. *Benner Line*, 246 U. S. 353, at p. 356:

> "The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship."

*2. A Ship Owner Cannot Limit Liability Under a Personal Contract.*

Although the District Court held that the charter party was the personal contract of the owners, and that the vessel was not seaworthy, Judge Hough considered that the owners had not given up "the benefit of statutes which merely embody many centuries of admiralty law." *Opinion*, 266.

The Circuit Court of Appeals, however, held that, "our decision in the *Benner Line*, 217 Fed. Rep. 497,

holds that the owner cannot limit his liability against this express contract." *Opinion*, 276. The affirmance of the *Benner Line* case by this Court, 246 U. S. 353, gives added significance to the opinion of the Circuit Court of Appeals in this case.

a. Distinction Between Liabilities Imposed by Law and Created by Contract.

The argument of the petitioners in their brief is that limitation should be allowed unless the failure to make the vessel seaworthy,—a failure in *performance* of the contract,—occurred without the privity or knowledge of the owners; but the argument and the cases cited apply only to the limitation of liabilities imposed by law and not to cases where a party has voluntarily *created* a liability not imposed by law, which do not stand on the same basis in principle and have been dealt with differently under the authorities. As this Court said in *Pendleton* v. *Benner Line*, 246 U. S. 353, at p. 357:

> "It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether, he must answer for the breach whether he was to blame for it or not."

The charterer contends that the decision of the Circuit Court of Appeals was correct both on principle and on the authority of *Benner Line* v. *Pendleton*. The personal contract of a ship owner is not such a matter as

is included in the purview of the limitation acts. The distinction is not whether the contract binds the ship or not, but is whether the contract is an imputed or a personal undertaking. This charter party is a personal contract, although it binds the ship, while a bill of lading, passenger ticket, or similar document usually is not of a personal nature because not negotiated or signed by the owner, but by someone whose acts are imputed to the owner by law.

b. Distinction Between Charters and Other Contracts of Carriage.

This clears up the difficulty suggested in the petitioner's brief that the personal contract doctrine, if invoked here, could be applied to prevent limitation of liability in every case of carriage of passengers and cargo under whatever documents. A bill of lading or passenger ticket has never been regarded as a personal contract of the ship owner, is usually not signed personally by him, and is obviously different in its very nature from a time charter. While the former are issued and dealt with as a matter of the routine business of a large organization, the latter are almost invariably carefully scrutinized by the most experienced men of a shipping concern and are often, as in this case, negotiated and signed by them personally.

The distinction is made clear in one of the early cases cited in the petitioners' brief, *Quinlan* v. *Pew*, 56 Fed. 111, 118, where Putnam, C. J., said that the limitation statute "has regard for the usual necessities of the occupations of life, and in that respect intends that owners

may avail themselves of the proper facilities common to business men."

In entering into contracts such as bills of lading and passenger tickets, ship owners are availing themselves of "proper facilities common to business men" and the liabilities under such contracts are imposed by law and are not created by the particular way in which the document is drawn up and signed. On the other hand, in the case of time charters, a ship owner is dealing directly with a charterer and may or may not place in the charter party undertakings from the breach of which personal liabilities may result. It is obviously fair and reasonable that liability for the breach of such undertakings as the ship owner may knowingly and voluntarily place in his personal contract should stand on a different basis from liability for breach of duties imposed by law, which not only usually are carried out by agents, but also on account of the exigencies of business must be carried out by agents.

The petitioners, and Judge Hough in his opinion in the District Court, seek to distinguish *Benner Line* v. *Pendleton* on the ground that it involved a voyage charter party for a single voyage. There is, however, no real distinction in principle between the case of a warranty of seaworthiness for a single voyage, and a continuing warranty, such as this, in a time charter; for in the latter case the fair purport of the covenant is that the vessel must be seaworthy at the beginning of every voyage.

c. State of the Authorities.

It is fundamental that a ship owner cannot escape liability for fulfilment of his own contract. This general principle was established in the Circuit from which this case comes as early as 1888 on the basis on which the Circuit Court of Appeals has applied it. In *The Amos D. Carver*, 35 Fed. 665, Judge Brown said at page 669:

> "The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not, I think, restrict the liability of owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner's express intervention."

In later decisions Judge Brown adhered to this interpretation. Apparently his view has never been questioned in the Second Circuit; *The Amos D. Carver* has been cited with approval by this court in *Richardson* v. *Harmon*, 222 U. S. 96, 106; and the affirmance of *Benner Line* v. *Pendleton*, 217 F. 497; 246 U. S. 353, seems to preclude further discussion on the subject.

The conclusion reached in that case, at p. 356, was:

> "That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon*, 222 U. S. 96. It was said in that case, page 106, that § 18 leaves the owner 'liable for his own fault, neglect and contracts'. The principle was held to apply to contracts less personal than this in *Great*

*Lakes Towing Co.* v. *Mill Transportation Co.*, 155 Fed. Rep. 11, and in *The Loyal*, 204 Fed. Rep. 930. We are not disposed to disturb the very strong and deliberate intimations of *Richardson* v. *Harmon* in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not."

C. EDGAR F. LUCKENBACH, AS WELL AS THE ESTATE OF LEWIS LUCKENBACH SHOULD BE HELD PERSONALLY RESPONSIBLE UNDER THE EXPRESS CONTRACT.

The charter party was drawn up by the petitioners on a blank, which was headed "Edgar F. Luckenbach, shipowner, agent and broker, New York City, N. Y." It purported to be made between the "Estate of Lewis Luckenbach, owners of the good American screw steamship Julia Luckenbach * * * and Insular Line, Inc., New York, N. Y., charterers". *Claimant's Exhibit C*, 234. It was signed "Estate of Lewis Luckenbach, per Edgar F. Luckenbach, Trustee." The signature was affixed by Edgar F. Luckenbach personally. *Luckenbach*, 255; *Claimant's Exhibit C*, 238.

The Court of Appeals held that only the Estate of Luckenbach was personally liable beyond the limited value of the ship by reason of this signature, *Opinion*, 276; *Mandate*, 277.

But under the decision in the case of *Pendleton* v. *Benner Line*, 246 U. S. 353, it would appear that Edgar F. Luckenbach was also personally liable, by reason of the fact that he personally signed the document. In that case Fields S. Pendleton signed the charter party as "Pendleton Brothers", of which he was a partner. P. 354. In dealing with the effect of that signature Mr. Justice Holmes, at p. 356, said:

> "The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents, Pendleton Brothers purport to be contracting parties, *if we look only to the principals, the petitioner was one of them,* as part owner of the vessel. The contract was between human beings, and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship."

Mr. Luckenbach testified that in signing the charter party he agreed, "*on behalf of himself*" and the other owners, "to maintain the ship in an efficient condition as to hull and machinery throughout the service." *Luckenbach,* 255.

Although his signature purported to be only as Trustee, yet as, by his explicit admission, he personally intended to bind himself as a part owner, as well as the Estate of Luckenbach, both should have been held liable on the personal contract, beyond the limited value of the ship, and the decision of the Court of Appeals should be modified accordingly.

## LAST POINT

THE DECREE APPEALED FROM SHOULD BE REVERSED, WITH COSTS, AND THE DISTRICT COURT DIRECTED TO DISMISS THE LIBEL, WITH COSTS; OR, IN THE ALTERNATIVE, IF THE LIBEL BE NOT DISMISSED, THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED, BY DIRECTING THAT EDGAR F. LUCKENBACH, AS WELL AS THE ESTATE OF LEWIS LUCKENBACH, BE HELD UPON THE PERSONAL CONTRACT BEYOND THE LIMITED VALUE OF THE SHIP, AND AS SO MODIFIED, AFFIRMED, WITH COSTS TO THE INSULAR LINE, INC.

November, 1918.

Respectfully submitted,

J. PARKER KIRLIN,
MARK W. MACLAY, JR.,
Counsel for Insular Line, Inc.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

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# Supreme Court of the United States.

OCTOBER TERM, 1917.

No. [redacted]51

EDGAR F. LUCKENBACH, *et al.*, (Claimant-Respondents),
Petitioners,

*against*

W. J. McCAHAN SUGAR REFINING COMPANY, (Libelant),
Respondent,

AND

INSULAR LINE (Respondent),
Respondent.

## BRIEF FOR LIBELANT-RESPONDENT.

LAWRENCE KNEELAND,
Counsel.

KNEELAND, HARISON & HEWITT,
Proctors.

# Supreme Court of the United States,

OCTOBER TERM, 1917.

No. 299.

EDGAR F. LUCKENBACH and others (Claimant-Respondents),
Petitioners,

*against*

W. J. MCCAHAN SUGAR REFINING COMPANY (Libelant),
Respondent,

and

INSULAR LINE (Respondent),
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

## BRIEF FOR LIBELANT-RESPONDENT.

### Statement.

The steamship "Julia Luckenbach" was chartered to the respondent, Insular Line, for a period of three years from May 31, 1911. The charter party was signed "Estate of Lewis Luckenbach per Edgar F. Luckenbach, Trustee," managing owner, and provided that the vessel should be "on her delivery, tight, staunch, strong and in every way fitted for the service," and contained a covenant by the owners to "maintain her in a thoroughly efficient state in hull and machinery for and during the service."

In the course of her performance of such charter, the steamship left New York, on April 13, 1912, for ports in Porto Rico, and after discharging her outward cargo, proceeded to San Juan, at which port, between April 23rd and 26th, she loaded a quantity of sugar. She then proceeded to the port of Arecibo, in the same island, where she loaded more sugar, and left that port on April 27th for Philadelphia, with 33,000 bags of sugar on board.

Bills of lading were signed by the respondent, Insular Line, the charterer, by which 25,620 bags of sugar were consigned to the libelant, at Philadelphia.

Within twenty-four hours after leaving Arecibo, it was discovered that there were seven feet of water in the after holds of the vessels. The pumps were unable to control the water and the steamer put back to San Juan, where she arrived on April 30th with thirteen feet of water in her after holds. A diver discovered a hole in the bottom of the vessel in the B strake, starboard side. This hole was plugged temporarily, the water was pumped out and temporary repairs were made by securing a small piece of iron plate over such hole. The vessel then proceeded to Philadelphia and discharged her cargo. An examination was then made which disclosed the fact that the plate in which the hole occurred, and which was originally one-half inch thick, was wasted and corroded for some distance around the hole. The latter was oval in shape, the diameters being 1¾ inches and ⅞ inch, and at the circumference of such hole the thickness of the plate had been reduced to a knife edge. This deterioration of the plate had been caused by the corrosive action of a mixture of sugar and bilge water, a well-recognized cause of such deterioration, and was due to the broken or defective condition of the cement on the inside of the plating, which had permitted such mixture to come in contact with the iron plate. According to the testimony, such a deterioration of the plate as had occurred in this instance

would require at least two years of exposure to the sugar drainage. Much of libelant's sugar stowed in the after holds had been dissolved and other parts of same had been damaged. Shortly after the discharge of the cargo the libel herein was filed against both the steamship and the charterer, Insular Line. Claim to the steamship was filed by the petitioner, Edgar F. Luckenbach, Trustee of the Estate of Lewis Luckenbach, a stipulation for the value of the steamship was filed, and she was released from custody. Subsequently the respondent, Insular Line, by petition, impleaded all of the owners of the steamship.

The libel alleged that the damage to the libelant's sugar was caused by unseaworthiness of the steamship, in that the plate in her bottom was so corroded as to cause the hole above described; that such defect could have been remedied by the exercise of due diligence in inspection; and that the owners of said steamship had failed to exercise due diligence to make her seaworthy and fit to perform the voyage safely.

It was not alleged in the answers of the claimant and of the respondent, Insular Line, that the steamship was seaworthy, but both alleged that due diligence had been exercised by her owners to make her seaworthy, and both claimed the benefit of the provision in the bills of lading, exempting the carrier from liability for loss or damage occasioned by:

> "any latent defect in hull, machinery or appurtenances; or by unseaworthiness of the ship, even existing at the time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the shipowner or manager."

Both the claimant and the charterer also claimed the benefit of the following stipulation contained in the bills of lading,—

> "and in case of any loss, detriment or damage done

or sustained by said goods, or any part thereof, for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of such goods."

The claimant also alleged that the damage to the cargo was done and occasioned without the privity or knowledge of the owners of the vessel and that the latter were entitled to a limitation of their liability to the value of the vessel and her freight then pending.

The District Court decided:

(1) That the steamship was unseaworthy at the beginning of the voyage and that her owners had not exercised due diligence to make her seaworthy.

(2) That the bill of lading provision whereby the carrier contracted for the benefit of the cargo insurance could not be enforced for the benefit of either the owners of the vessel or the charterer.

(3) That neither the express warranty of seaworthiness in the charter party nor the covenant of the owners to maintain the vessel in that condition throughout the service deprived her managing owner, who signed the charter party, of the right to a limitation of his liability.

The value of the steamship and her pending freight having been determined to be less than the amount of the libelant's damage, the decree of the District Court adjudged that the libelant recover from the claimant and other owners of the steamship the value of said vessel and her freight, with interest, and that it recover the balance of its damage from the charterer, Insular Line.

The Circuit Court of Appeals concurred with the District Judge in holding that the steamship was unsea-

worthy and that her owners had not exercised due diligence to make her seaworthy.

It also concurred with the District Judge in holding that neither the owners of the steamship not the charterer could benefit by the insurance effected on the cargo. It disapproved the decision of the District Court limiting the liability of the claimant to the value of the steamship and her freight, and directed that the decree of the District Court be modified so as to award the libelant its full damages, payable primarily out of the steamer and the Estate of (Lewis) Luckenbach, any deficiency to be paid by the charterer.

## FIRST POINT.

**Both Courts below held that the loss had been occasioned by the unseaworthiness of the vessel, and that due diligence had not been exercised by her owners in that respect.**

The settled rule of this Court in such cases renders it unnecessary to discuss the evidence bearing upon these questions, and we shall refrain from doing so, notwithstanding the fact that such evidence is discussed in Petitioner's brief, upon the wrongful assumption that such decisions were erroneous as a matter of law.

## SECOND POINT.

**The question as to the right of the managing owner of the steamship to a limitation of his liability is one in which the libelant is not really interested.**

The libelant's contract was with the charterer only and its claim against the steamship and her owners is con-

fined to the enforcement of its maritime lien against the former.

Furthermore, if a limitation of the liability of such owner be granted, the libelant will recover the excess of its damages, over the value of the steamship and her freight, from the charterer.

The discussion of this question will therefore be left to Counsel for the Charterer, the real party interested.

## THIRD POINT.

**Neither the owners nor the charterer are entitled to the benefit of the insurance effected on the cargo, or the moneys loaned or advanced by said insurers to the libelant after this suit was instituted.**

The basis of the claim in this respect is the stipulation in the bills of lading—

> "And in case of any loss, detriment or damage done or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall, to the extent of such liability, have the full benefit of any insurance that may have been effected upon or on account of said goods."

Insurance had been effected on the libelant's cargo with five insurance companies, as follows:

| | | |
|---|---|---|
| Federal Insurance Co. | on 1/2 | interest. |
| Thames & Mersey Marine Ins. Co. | " 1/8 | " |
| Aetna Insurance Co. | " 3/32 | " |
| St. Paul Fire & Marine Ins. Co. | " 1/16 | " |
| Mannheim Ins. Co. | " 3/32 | " |

The policies of the Federal, Thames & Mersey and

Ætna Insurance Companies contained the following provision:

> "Warranted by the assured free from any liability for merchandise in the possession of any carrier or bailee, who may be liable for loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier shall have the benefit of any insurance thereon."
>
> (Libelant's Exhibits 1, 6 and 8. Record, pp. 215, 221 and 225).

Those of the St. Paul and Mannheim Insurance Companies contained the following provision:

> "And it is also understood and agreed that in case any agreement be made or accepted by the assured with any carrier or bailee, by which it is stipulated that such or any carrier or bailee shall have in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event the insurers shall be discharged from any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against, shall be liable and owe actual payment for (only) what cannot be collected from carrier and/or bailees, * * * * * * * but also shall be chargeable with the direct pecuniary consequences to the assured temporarily arising from delay in collecting from said carrier and/or bailees * * * * * and the advancing for this purpose only of funds to the assured for his protection pending such delay shall in no case be considered as effecting the question of the final liability of this insurance, and as soon as collection is made from the carrier and/or bailees * * * * shall be repaid to the insurers, but in case of final failure to collect from the carrier and/or bailees * * * *, a portion of the sums advanced by the insurers, equal to the sum short collected from the carrier and/or bailee * * * * may be retained and applied in settlement of the actual liability of this insurance thereby established (provided

always the loss shall constitute in other respects a claim under this insurance)."

(Libelant's Exhibits 7 and 9, Record, pp. 223-224 and 227).

Conceding the legality of the bill of lading provision, it is well settled that it does not constitute a *defense* to a claim against the carrier; that the cargo owner is not obliged to insure for the benefit of the carrier; and that the latter is entitled to the benefit only of such rights as the cargo-owner may have against his insurers.

Its effect is only this: If the libelant had insurance at the time of the loss, which it could make available to the carrier, or which, before bringing suit against the carrier, it had collected *without condition*, then, if it had wrongfully refused to allow the carrier the benefit of the insurance, a counterclaim by way of recoupment or set-off might be sustained, but otherwise not.

*Inman* vs. *South Carolina Railway Co.*, 129 U. S. 128-140.

It is certain that there was no insurance upon the cargo in this case which the carrier, succeeding to the rights of the libelant, could have enforced.

(1) The fact that the vessel was unseaworthy at the beginning of the voyage was a complete defense to any suit against the insurers, since their policies never attached.

(2) The provisions of the several policies exonerating the insurers from liability for loss of merchandise shipped under a bill of lading containing a stipulation that the carrier should have the benefit of any insurance thereon, was also a complete defense to the insurers.

*Pennsylvania R.R. Co.* vs. *Mannheim Ins. Co.*, 56 Fed. R. 301.

*Bradley* vs. *Lehigh Valley R.R.*, 153 Fed. R. 350, 82 C. C. A. 426.
*Pennsylvania R.R. Co.* vs. *Burr*, 130 Fed. R. 350, 65 C. C. A. 331.
*Fayerweather* vs. *Phenix Ins. Co.*, 118 N. Y. 324.

It is contended, however, that certain transactions between the libelant and the cargo underwriters, after this suit had been commenced, whereby the latter loaned or advanced to the former their respective proportions of the cargo damage constituted *payments*, to the benefit of which the owners of the vessel and the charterer are entitled.

The facts connected with such transactions are as follows:

The libel in this case was filed on June 3, 1912, and in August of the same year, the five insurance companies advanced or loaned to the libelant their respective proportions of the amount of the loss and damage to the libelant's sugar, under agreements evidenced in certain receipts which the libelant signed. The receipts taken by the Federal and Aetna Insurance Companies were identical in form, although for different amounts. That taken by the Federal Ins. Co. read as follows:

> "Received from the Federal Insurance Company .....Dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on SS. *Julia Luckenbach* from Porto Rico/Philadelphia on or about.....190 , or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them, duly endorsed, the bills of lading for said property, and we

agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence, at the expense and under the exclusive control of the said Federal Insurance Company."

(Record, pp. 220 and 221.)

The receipt taken by the Thames & Mersey Marine Insurance Co. reads:

"Received from The Thames & Mersey Marine Insurance Company, Limited, ..... Dollars, being a loan without interest pending investigation of claim arising from loss of and/or damage to sugar per 'Julia Luckenbach' (S) to be repaid only from any recovery that may be made against third parties against whom suit is hereby authorized to be made in our name at expense of The Thames & Mersey Marine Insurance Company, Limited."

(Record, p. 224.)

That taken by the St. Paul Fire & Marine Ins. Co. reads:

"Borrowed and Received of the St. Paul Fire & Marine Insurance Company the sum of..... Dollars, as a loan and not as a payment of any claim which I/we may have against said Insurance Company.

This amount is loaned to me/us and is to be returned by me/us to the St. Paul Fire & Marine Insurance Company when and to the extent which I/we recover from any other person or corporation the value of sugars * * * * * * shipped per Str. Julia Luckenbach, Slg. May 1, 1912 from Porto Rico to Philadelphia.

In consideration of said Loan I/we hereby agree to use my/our best endeavors to recover the value of the sugar mentioned above, from any and all persons and corporations who may be liable therefor, and that I/we will institute and prosecute any and all suits and proceedings in my/our name for that purpose, as I/we may be requested by the

underwriters on the cargo, but at their expense and not mine/ours."

(Record, p. 222.)

The Mannheim Insurance Company received a letter from the libelant reading as follows:

"In consideration of your advancing us the sum of.....Dollars as a loan to be repaid as recovery may be effected from the carriers in respect of the undernoted merchandise, we hereby agree to put forward a claim against the Carriers and/or Bailees of the said merchandise in whose hands the same received damage and upon receiving payment from them we hereby undertake to refund you whatever is recovered.

It is further understood and agreed that you are to be responsible for all Costs, Attorney's fees and Expenses incurred in connection with the claim."

(Record, pp. 225-226.)

The head of the loss department of the Federal Insurance Company (Ogden) testified under cross-examination, concerning the receipt taken by said company as follows:

That the form of the receipt by that company was the form used when the company did not consider itself liable; when it considered itself liable a different receipt was used; that it was the intent that, if the libelant was unsuccessful in this suit, the amount advanced would be considered an absolute payment; that such agreement was outside the scope of the policy; that the company did not consider itself liable; that it was not meant merely as an act of kindness; that they did not consider it fair to the insured to be between two stools; that it was very largely automatic, for if the shipowner is not responsible, the company, in most cases, is; and that it tries to protect the insured and to a large extent protects itself in doing it; that the amount advanced to the insured was

the full amount which the company would have paid had it admitted liability; that the company had received proofs of loss and knew that the bills of lading contained a stipulation that the carrier should have the benefit of the insurance; that in a case where the loss should not be recovered from the carrier, no part of the amount advanced would be returned by the assured; that the real effect of the transaction was that they had advanced to the assured the amount of his loss, as a loan, and that their sole recourse in respect to that loan was limited to what might be realized in this proceeding out of the steamer or charterer, there being no other recourse against the assured for the amount of said loan. (Record, pp. 28-30.)

It was stipulated by the libelant that the representatives of the other insurance companies, if called as witnesses, would have testified that the amounts for which the receipts were taken represented the full amounts which would have been paid, if they had paid the losses in the regular course, and that in no case was there any recourse by these companies against the libelant, except to the extent of the recovery which the latter might make in this action. (Record, p. 31).

The District Judge commented in somewhat caustic language upon the use of the word "loan" in these transactions, yet he felt obliged to follow the decisions of the Circuit Court of Appeals in *Pennsylvania RR. Co.* vs. *Burr, supra,* and *Bradley* vs. *Lehigh Valley R.R. Co., supra,* stating:

> "What was done in this case, the course of business pursued, the anticipated, agreed upon and paid-for insurance schemes, differed from that pursued, investigated and approved in the Burr and Bradley cases in no material particular."

The Circuit Court of Appeals said:

> "Though the purpose of the insurance company is apparent, we can understand a contract of loan which is to be repaid only on a certain condition e.g. the shippers' recovering from the carrier."

The District Judge stated that the decisions in the Second Circuit "give a very fair picture of the sort of thing which has rendered the decision in *Phoenix Insurance Co.* vs. *Erie & Western Tr. Co.*, 117 U. S. 312, only useful among fools."

Since in the order of ultimate liability, that of the carrier is, in legal effect, primary and that of the insurer secondary, it was inevitable that insurers would adopt means to defeat the subrogation of carriers to the insurance on cargo.

In the earliest decision by a Federal Court sustaining the validity of a bill of lading stipulation giving the carrier the benefit of the cargo insurance, Judge Shipman said, in answer to the argument that such an agreement was unfair to the insurer:

> "They (the insurers) can in view of this provision in bills of lading, modify the contracts which they have heretofore customarily made with the insured and the result will probably be that the insurers will also make provisions in their policies by virtue of which insurance on property in transit will have a limited character."
>
> *Rintoul* vs. *N. Y. Central, etc.*, 17 Fed. R. 905.

The decisions in the Second Circuit, which the District Court criticises, are based upon the decision of this Court in *Inman* vs. *South Carolina Ry. Co., supra.*

In that case this Court said:

> "And, indeed, under the terms of these policies, payment itself would have been subject to such conditions as the Companies chose to impose. Although

> in the order of ultimate liability, that of the carrier is in legal effect primary, and that of the insurer secondary, yet the assured can, in the absence of provisions otherwise controlling the subject, insist upon proceding under his contract, first, against the parties secondarily liable, and when he does so, he is bound to give the latter the benefit of the remedy against the party principal; but these insurers could, under their contracts require the owners to pursue the carrier in the first instance, and decline to indemnify them until the question and measure of the latter's liability were determined. This they did, and to their action in that regard the defendant is not so situated as to be entitled to object."

It is not necessary that the agreements between the libelant and the insurers of the cargo should be either "loans" or "advances"; it is enough that they did not constitute "unconditional payments."

Before anything was advanced by the insurers in this case the libelant had commenced suit against the vessel and the charterer and it agreed to prosecute such suit to a conclusion. The insurers were in a position to require this, since no claim by the libelant or by the carrier against the insurers could have been enforced.

The carriers have lost no right to which they were legally entitled by the action of the libelant and his insurers, and they are not so situated as to be entitled to object thereto.

The petitioner's brief refers only to the transaction between the libelant and the Federal Insurance Company, which differs, however, in no material respect from those with the Aetna and Thames & Mersey Companies.

There was no provision in the policies of these companies for any loan or advance under the circumstances presented in this case.

In the case of the St. Paul and Mannheim Companies, however, the policies provided for such advances, but ex-

pressly provided that if any agreement was made giving the carrier the benefit of the insurance, the companies should be discharged from liability, and that the advancing of funds to the assured pending his collection from the carrier should not affect the companies' liability.

The question of the effect of a loan or advance of the amount of the loss repayable only out of the recovery from the carrier, under both forms of policies and under the same forms of receipts as were taken here, has been considered by the Circuit Court of Appeals for the Second Circuit, in *Bradley* vs. *Lehigh Valley R.R. Co.* and *Pennsylvania R.R. Co.* vs. *Burr*.

The question has also been considered and decided in the same way in

*Southard* vs. *Minneapolis, etc., Ry.*, 60 Minn. 382.

*Gulf, etc., Ry. Co.* vs. *Zimmerman*, 81 Texas 605.

*Kalle* vs. *Morton*, 156 App. Div. (N. Y.) 522.

Counsel for the petitioner and for the charterer argue, however, that these advances were in effect *payments* and that the carriers are therefore entitled to the benefit of same, and they cite in behalf of this contention—

*Lancaster Mills* vs. *Merchants Cotton Press*, 89 Tenn. 1.

*Deming* vs. *Same*, 90 Tenn. 310, and

*Roos* vs. *Pennsylvania R.R. Co.*, 199 Pa. St. 378.

The distinguishing fact in all of these cases is, as is pointed out in the opinions, and in the opinions in other cases in which they are cited, that the insurers were legally liable to their insured, and that being so liable what they chose to term a loan must be considered a payment.

In *Lancaster Mills* vs. *Merchants Compress Co.*, the Court distinguishes the case from that of *Inman* vs. *South Carolina Ry.*, stating (p. 59):

> "That case and this are totally unlike both with respect to the fact of payment (for no money was paid or loaned to the assured) *as well as in the more important distinction that there the carrier's liability was primary as between it and the insurer.*"

The facts in both the above case and that of Deming *vs.* same defendants were, that the Compress Company had agreed to carry fire insurance on the cotton of shippers deposited with it by a railroad company. It failed to effect insurance for a sufficient amount to cover all of the cotton in its possession at the time the fire in question occurred.

The fire was not occasioned by any fault on the part of either the Compress Company or the railroad, and the only ground upon which liability of the Compress Company to the plaintiffs could be predicated was its failure to insure as it had agreed to do. The plaintiffs having themselves effected insurance upon their cotton, which was in all respects valid and enforceable, it was held that the Compress Company was not liable, and that sums advanced or loaned to the plaintiffs by their insurers were, in legal effect, payments of their losses.

In *Southard* vs. *Minneapolis, etc., Ry. Co., supra*, it was said:

> "But it is clear that the insurance company absolved from payment as it was, and under no legal liability to pay, had the right to exact such terms with respect to the party primarily liable as it chose as a condition of payment. *Inman* vs. *South Carolina Ry. Co.*, 129 U. S. 128. This is no new proposition of law and is distinctly recognized in one of the cases relied on by defendant's counsel. *Lancaster Mills* vs. *Merchants Cotton Press*, 89 Tenn. 1."

In *Peninsular & Occidental S.S. Co.* vs. *Atlantic Mutual Ins. Co.*, 158 Fed. R. 152-177, where the insurers had advanced the amount of a loss to the assured under the same form of receipt as was taken by the Federal Ins. Co. in this case, it was said:

> "It is argued that this transaction was a voluntary payment of the remainder of the loss which prevents recovery in the present action; and *Deming* vs. *Merchants, etc., Co.*, 90 Tenn. 331, is cited to support this proposition. As I read that case, it does not so decide. There a loan in form was made and held to be in reality a payment, but the ruling is expressly put upon the ground that the insurance company making the payment had conceded that the whole loss was covered by its own policy, and that the Company was liable therefor. It was therefore bound to pay the whole, and the Court held that, having actually paid it, it could not avoid the effect of payment merely by calling it a loan."

In *Pennsylvania R.R. Co.* vs. *Burr*, 130 Fed. R. 847, 850, it was said:

> "The defendant contends that this was really a payment of the loss under the policy, thus waiving the benefit of the clause, and reference is made to *Roos* vs. *Railroad Co.*, 199 Pa. 378, 49 Atl. 344.
>
> In that case an insurance company had insured $2,000 on property worth $4,200 and there had been a loss of $1,700. The amount of claim against the company was $809.50. That sum of money was turned over to the assured upon a written acknowledgment that it was 'borrowed and received from the insurer, being a loan pending the investigation and determination whether the loss was one for which the carrier should be held liable * * * and if the carrier should be held liable, the undersigned agrees to return the amount thus loaned, when and to the same extent same shall be recovered from the carrier.'
>
> The Court held that it was properly left to the

> jury to determine whether this was a bona fide loan, or an adjustment of the loss, and a finding that it was not a bona fide loan was sustained. What operated upon the jury's mind in that case we do not know, but it may be stated that the report contains no statement of what the policy contained. Whether or not there was any claim providing for such a loan does not appear."

An examination of the record in *Pennsylvania R.R. Co.* vs. *Roos* discloses the fact that the insurance policy was not introduced or even offered in evidence.

It is urged by counsel for the owners and for the charterer that the testimony of the witness Ogden is of great importance and that similar testimony was not before the Courts in the earlier cases in which this method of dealing between the cargo owner and his insurers was considered. Stress is laid upon the testimony of this witness that the sole recourse of the insurers in respect to their loans was limited to what might be realized in this case, and that the amounts loaned were the amounts the insurers would have *paid*, had they admitted their liability.

We submit, however, that no other inference can be drawn from the language of the receipts themselves, than that nothing is to be repaid except the recovery in this suit. Indeed, the testimony of the witness Ogden adds nothing to the terms of the receipts taken, except that the amounts loaned were the full amounts which would have been recoverable from the insurers, had they been liable to their insured.

Whether the sums received by the libelant be termed "loans," advances, or "conditional payments," the amount thereof is unimportant; and whether they were, or were not, equal to the amounts the insurers would have paid, if liable, does not alter their *conditional* character, or the fact that the insurers were entitled to exact such conditions.

While it is true that in *Pennsylvania R.R. Co.* vs. *Burr* there were but two written documents before the Court, viz.: the policy of insurance providing for the making of a loan under certain contingencies, and the receipt indicating that such loan had been made, such was not the case in *Bradley* vs. *Lehigh Valley R.R. Co.*

In the latter case there were before the Court not only the policy (which did not provide for the making of a loan) and the receipt showing that a loan had been made, but, also, the claim presented to the insurer for the insured value of the lost cargo, which was for the exact amount which the insurer had loaned, and an admission that the suit had been brought for the benefit and at the expense of the insurer.

In that case it was said:

> "When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad com-

> pany for the benefit of the insurance company * * * * That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss when insured cargo has been damaged or destroyed while in the custody of the carrier has resulted in efforts by each to cast the burden upon the other, by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical advantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption."

In all of the cases heretofore cited the insurer would have been liable except for the provision exempting them from liability when the carrier had been given the benefit of the insurance. If all of such provisions in the policies be disregarded there was another defense to the insurers in this case.

When it was decided that the steamship was unseaworthy all of the contracts of insurance were avoided.

The known facts as to the presence and nature of the hole in this vessel's bottom, gave rise to a strong presumption of her unseaworthiness when she sailed. Unless this presumption was rebutted the insurers knew that they were not liable and that the carriers probably were. Under these circumstances how can the carriers claim to have been injured or to have lost any right, because the insurers chose to say in effect to the libelant—

> "We believe that this vessel was unseaworthy and that we are not liable to you, but that the vessel and her charterer probably are. We recognize however that such unseaworthiness was not due to any fault on your part, and if you will proceed against the vessel, we will see that you lose nothing, even the use of your money, which we will advance to you.

> If you succeed in recovering from the carriers, you are to pay back to us that recovery. If you fail, it will prove that we were wrong in our contention, and in that event you need not repay the amount advanced."

It is certain that such an arrangement has deprived the carrier of no right which it could enforce, and has in no way worked to its injury.

A similar loan or advance by an insurance company, under somewhat different circumstances was considered and approved in *Peninsular & Occidental S.S. Co.* vs. *Atlantic Mutual Ins. Co., et al, supra.*

The libelant, in that case, had insured one of its vessels with several insurance companies. The policy of the Federal Insurance Company was prior in date. A loss having occurred, the Federal Company contended that it was liable for only 40/75 of the loss, while the subsequent insurers contended that the Federal Company was liable for the whole loss, and refused to pay. Thereupon, the Federal Ins. Co. *paid* to the libelant the 40/75 for which it admitted liability, and advanced to it the remaining 35/75 *as a loan without interest and repayable only to the extent of any net recovery the insured might receive as the result of suits brought by it against the other insurers.*

The subsequent insurers contended that this was a "payment," which discharged them from liability, and concerning this contention the Court (McPherson, J.) said:

> "I do not see why such an agreement should be construed to mean what the parties never intended. It was not, and was not meant to be a payment. The Federal Company and the subsequent insurers were the real parties to the dispute. Evidently one or the other must make good the unpaid part of the libelant's loss, but they could not agree upon whom the liability must fall. In that situation, the Federal

> Company said, in effect, to the libelant,—'pending the settlement of this dispute, we are willing to lend you the money in controversy, if you will agree to pay it back in case the Court gives you a decree against the subsequent insurers. If you fail in the suit, your failure will mean that we are wrong in our view of the law, and ought to have paid you in full at first. In that event the money will be in effect, adjudged to be yours and need not be repaid.' Such a transaction seems to me to be fair and unobjectionable. The assured gets the immediate use of the money which he must ultimately recover from one or the other disputant, and the quarrel is fought out between the real parties in interest. The subsequent insurers lose no right, for, if they are liable at all, they are liable because they made binding contracts directly with the libelant, and it can make no difference to them what becomes of the money, which their contracts oblige them to pay."

The approval of this method of dealing between the insurers and the insured above expressed is, we submit, merely an elaboration of the reasons stated by the witness Ogden for pursuing the same method in the present case:

> "We don't think it is fair to the insured to be between two stools; it is automatic very largely; if the shipowner isn't responsible in almost all cases we are; we almost always try to protect them, and to a large extent we protect ourselves in doing it."

What was done in the present case is, we submit, as "fair and unobjectionable" as it was in the case last cited; and so long as the carriers are not deprived of any right or remedy which they could legally enforce, or any defense which they might legally interpose, they are not entitled to object.

The cargo owner receives the benefit of the use of the money he is entitled to receive from either carriers or insurers without awaiting the delay which is involved in the determination of the carrier's liability.

The insurers benefit by having the question of the carrier's liability determined while witnesses are available, whereas if the question of the seaworthiness or unseaworthiness of the vessel is left for determination in an action against the insurers, delay in bringing such suit may result in the loss of the necessary witnesses through the loss of the vessel and her crew.

## LAST POINT.

**The decree of the Circuit Court of Appeals should be affirmed.**

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KNEELAND, HARISON & HEWITT,
Proctors.

# LUCKENBACH ET AL. *v.* W. J. McCAHAN SUGAR REFINING COMPANY AND THE INSULAR LINE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 51. Argued November 18, 1918.—Decided December 9, 1918.

Where the bills of lading stipulated that the carrier should have the benefit of any insurance that might be effected by the shipper, but the shipper's policies provided that the insurers should not be liable for merchandise shipped under bills containing such stipulations or in the possession of any carrier who might be liable for its loss or damage, *held*, that an arrangement between the insurers and the shipper, whereby the former loaned to the latter the amount of a loss caused by the carrier's negligence, to be repaid only in so far as the shipper recovered from the carrier, otherwise to operate in effect as absolute payment under the policies, and whereby, as security, the shipper pledged such prospective recovery and the bills of lading and agreed to prosecute suit against the carrier at the expense and under the exclusive direction and control of the insurers,—was a lawful arrangement; that the loan was not a payment of the insurance and the carrier was not entitled to the benefit of it; and that a libel

brought in the shipper's name, for the benefit of the insurers, pursuant to the agreement, could be maintained against the carrier and the ship. P. 148.

Liability for unseaworthiness, resting on the personal contract of the shipowner, is not limited by Rev. Stats., § 4283, or the Act of June 26, 1884. P. 149.

A time charter characterizing the vessel as "tight, staunch [and] strong," on delivery, and binding the owners to "maintain her in a thoroughly efficient state in hull and machinery for and during the service," imports a warranty, without limitation, of seaworthiness, not merely at delivery, but at the commencement of every voyage. P. 150.

A time charter, like a charter for a single voyage, is not a demise of the ship, and leaves the charterer without control over her maintenance and repair, though liable without limit as to shippers for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners. *Id.*

A charter party was signed by but one of the owners, but the rest, being impleaded with him, admitted that he acted for all, and the liability of all, if liability existed, was not controverted. *Held*, that a decree for damages should run against all. P. 151.

235 Fed. Rep. 388, modified and affirmed.

THE case is stated in the opinion.

*Mr. Roscoe H. Hupper*, with whom *Mr. Walter S. Carter* and *Mr. Charles C. Burlingham* were on the brief, for petitioners:

In this case (unlike *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. Rep. 847, and *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed. Rep. 350), we have complete evidence of the intentions of the underwriters when the moneys were advanced. The effect is to make the payments unconditional payments of insurance.

It may be that the cargo owners' acceptance of the bill of lading broke the warranty, and that the insurance companies could have refused to pay; but it is clear that any breach was waived and was always intended to be waived. This waiver cannot convert into something other

than insurance the money which the cargo owners received in return for their insurance premiums. So far as the carrier is concerned, there need have been no insurance policies at all, and it matters not in what form or under what arrangement the money is paid the cargo owner, so long as it is in fact a payment to him for his own benefit.

The only conclusion to be reached on the whole evidence is that there was an unconditional payment of insurance. This case is distinguished from *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. The insurance companies' right to demand repayment of the "loan" is merely their right of subrogation parading in disguise. The value of the two rights is the same: the amount received from the carrier. They depend upon the same condition: liability of the carrier. The only distinction is in name.

Since the insurance companies made their "loan" agreements with the cargo owners after they knew the latter were bound by contract to give the carrier the benefit of insurance, their rights are subordinate to those of the carrier, by analogy with the rule in equity that a second assignee taking with notice of the rights of a prior assignee is postponed. See Pomeroy's Equity Jurisprudence, 3d ed., §§ 713, 715. The situation is also similar to that presented by a prior equity, uniformly held to be a burden on the legal estate. *Id.*, § 730; *Great Lakes & St. L. T. Co.* v. *Scranton Coal Co.*, 239 Fed. Rep. 603, 609.

The authorities hold that the so-called "loans" are payments of insurance. Our contentions are supported by *Roos* v. *Philadelphia, Wilmington & Baltimore R. R. Co.*, 199 Pa. St. 378; *Lancaster Mills* v. *Merchants Cotton Press Co.*, 89 Tennessee, 1; *Deming & Co.* v. *Merchants Cotton Press Co.*, 90 Tennessee, 310.

The Limited Liability Statute applies to every case of liability on account of the vessel where the owner is free

from privity or knowledge. There is no principle of construction to justify the exclusion of specific cases falling within the language of the statute, which has always been liberally construed. That the statute contemplated contracts is made clear by the reference to property, goods and merchandise shipped or put on board the vessel, and by the reference in § 4286, Rev. Stats., to the chartering of a vessel. When the Limited Liability Act was passed in 1851, the transportation of goods was always pursuant to contract, just as now, either by bill of lading or charter-party, to which the warranties of seaworthiness attached. Ships do not move and no service is performed with or by means of ships except by virtue of a contract or an agreement on the part of the shipowner, and therefore the personal contract doctrine could be applied to prevent limitation of liability in every case, as to carriage of passengers and cargo.

This case is not similar to those where limitation of liability has been denied because of a "personal contract," *Great Lakes Towing Co.* v. *Mills Transportation Co.*, 155 Fed. Rep. 11; *The Loyal*, 204 Fed. Rep. 930; *The Amos D. Carver*, 35 Fed. Rep. 665, and *Richardson* v. *Harmon*, 222 U. S. 96, 106, illustrate the meaning of "personal contract," and show that a personal contract is one to be performed by the owner entirely irrespective of the vessel. *Benner Line* v. *Pendleton*, 217 Fed. Rep. 497; 246 U. S. 353, involved a voyage charter-party containing a provision that the vessel should be "tight, staunch, strong, and in every way fitted" for the voyage, and the loss was found to have resulted from unseaworthiness existing when the schooner began the voyage. In this case the seaworthiness of the Julia Luckenbach when delivered under the time charter cannot be questioned. We cannot believe that the right to limitation depends on the accident of who signs the charter; it depends on the nature of the contract. Limitation has been granted notwithstand-

ing contracts which were as much personal contracts as the charter-party in the case at bar. See *The Republic*, 57 Fed. Rep. 240, affd. 61 Fed. Rep. 109; *LaBourgogne*, 144 Fed. Rep. 781, affd. 210 U. S. 95; *The Jane Grey*, 99 Fed. Rep. 582, 585.

*Mr. Lawrence Kneeland* for the W. J. McCahan Sugar Refining Co., respondent.

*Mr. J. Parker Kirlin*, with whom *Mr. Mark W. Maclay, Jr.*, was on the brief, for the Insular Line, respondent:

The provision in the contract of carriage, that the carrier was to receive the benefit of any insurance, is valid, and prevents either the owner or insurer from maintaining an action against the carrier upon any terms inconsistent therewith. *Phœnix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 325.

If the warranties had any effect at all, it was to avoid the policies when the libelant accepted the bill of lading with the provision giving the carrier the benefit of insurance. *Carstairs* v. *Mechanics Insurance Co.*, 18 Fed. Rep. 473; *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. Payment of the loss with full knowledge of the facts was a waiver. The transaction was intended, and operated, as a final settlement with the insured.

The so-called loan receipts do not evidence any loan justly so described, but merely secure to the insurers their ordinary rights of subrogation upon payment. In equity subrogation accrues to the insurer without any express stipulation, and he may assert it in his own name.

By making the advance and entering into the agreement the insurer adjusted and paid the loss as between him and the assured, and the whole transaction was at an end. It is in this respect that the case at bar differs from *Inman* v. *South Carolina Ry. Co.*, 129 U. S. 128. The insurer's right of subrogation is limited by the benefit of insurance

clause in the bill of lading. *Wager* v. *Providence Insurance Co.*, 150 U. S. 99, 108.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The W. J. McCahan Sugar Refining Company shipped a cargo of sugar from Porto Rico to Philadelphia by the Julia Luckenbach, which was under charter to the Insular Line; and the cargo suffered severe damage. In the District Court of the United States for the Southern District of New York, a libel seeking damages was filed in the name of the shipper *in personam* against the Insular Line and *in rem* against the steamer. It alleged that the damages resulted from unseaworthiness of the hull, existing at the commencement of the voyage. The petitioners, owners of the ship, were impleaded. The bills of lading sued on contained a clause relieving the carrier from liability for damages arising from "any latent defect in hull, . . . or by unseaworthiness of the ship, even existing at time of shipment, or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager; . . ."

The libel alleged that the unseaworthiness would have been discovered, had due diligence been exercised. The District Court so found and held that the libelant was entitled to recover. The damages were agreed to be $87,526.65, with interest; and the value of the ship and pending freight was found or agreed to be $66,600. The owners duly moved for limitation of liability. The District Court found that the damages sustained were occasioned without the privity or knowledge of the owners; held that they were entitled to limit their liability, both as against the shipper and as against the charterer, who claimed indemnity; and ordered that the owners should pay the shipper's claim to the extent of the value of the

ship and pending freight; and that the balance should be paid by the Insular Line. 235 Fed. Rep. 388. Both the owners and the Insular Line appealed to the Circuit Court of Appeals. That court modified the decree, so as to award that payment of the full amount be made to the shipper primarily by the steamer and the owners; and that the charterer should be called upon to make payment only of the deficiency, if any. 235 Fed. Rep. 388. The case comes here on writ of certiorari granted on the petition of the owners. 242 U. S. 638.

It is urged, on three grounds, that the decision of the Circuit Court of Appeals should be reversed and that the District Court should be directed, either to dismiss the libel or to limit the owners' liability to the value of the ship and pending freight.

*First.* The owners contend that both lower courts erred in holding that the steamer was unseaworthy at the commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. *The Wildcroft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658.

*Second.* The owners (and also the charterer) contend that the libel should be dismissed, because the shipper had already been compensated for the loss by insurance which it effected; and that the carrier is entitled to the full benefit of this insurance.

The shipper had effected full insurance. The bills of lading sued on contain the following clause:

"In case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the

full benefit of any insurance that may have been effected upon or on account of said goods."

Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier. *Phœnix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312; *Wager* v. *Providence Insurance Co.*, 150 U. S. 99. In the case at bar, the shipper has received from the insurance companies an amount equal to the loss; but it is contended that the money was received as a loan or conditional payment merely, and that, therefore, the carrier is not relieved from liability. The essential facts are these:

The policies under which the shipper was insured contained the following, or a similar, provision:

"Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

The situation was, therefore, this: The carrier (including in this term the charterer, the ship, and the owners) would, in no event, be liable to the shipper for the damages occasioned by unseaworthiness, *unless* guilty of negligence. The insurer would, in no event, be liable to the shipper, *if* the carrier was liable. In case the insurer should refuse to pay until the shipper had established that recovery against the carrier was not possible—prompt settlement for loss (which is essential to actual indemnity and demanded in the interest of commerce) would be defeated. If, on the other hand, the insurers should settle the loss, before the question of the carrier's

liability for loss had been determined, the insurer would lose the benefit of all claims against the carrier, to which it would be subrogated in the absence of a provision to the contrary in the bill of lading, *The "Potomac,"* 105 U. S. 630, 634; and the carrier would be freed from liability to any one. In order that the shipper should not be deprived of the use of money which it was entitled to receive promptly after the loss, either from the carrier or from the insurers, and that the insurer should not lose the right of subrogation, agreements in the following (or similar) form were entered into between the insurers and the shipper:

"New York, Aug. 15, 1912.

"Received from the Federal Insurance Company, Twenty-three hundred four and 16/100 dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about ——— ———, 190—, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company.

The W. J. McCahan Sugar Refining Co.,

$2,304.16 R. S. Pomeroy, *Treasurer.*

"Description of property:—Sugar."

Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating

the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

Agreements of this nature have been a common practice in business for many years. *Pennsylvania R. R. Co.* v. *Burr*, 130 Fed. Rep. 847; *Bradley* v. *Lehigh Valley R. R. Co.*, 153 Fed. Rep. 350. It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible

salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the parties to the transaction. Compare *The Kimball*, 3 Wall. 37, 44. The insurer could not have been obliged to pay until the condition of their liability (*i. e.*, non-liability of the carrier) had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier, until the insurers had paid. In consideration of securing them the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.

*Third.* The owners contend that, under § 4283 of the Revised Statutes and § 18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. *Pendleton* v. *Benner Line*, 246 U. S. 353.

It is also urged that, as between the owners and the Insular Line, the original warranty of seaworthiness was

exhausted upon delivery of the ship to the charterers and that the maintenance clause relied upon does not import a warranty of seaworthiness at the commencement of each voyage under a time charter, but merely an obligation to pay the expense of keeping her hull and machinery in repair throughout the service. Neither the language of the clause nor the character of time charters afford support for this contention. The charter of the vessel states clearly that the vessel "being, on her delivery, tight, staunch, [and] strong" the owners will "maintain her in a thoroughly efficient state in hull and machinery for and during the service"—*not pay the expense* of maintaining her. This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage. Compare *The Burma*, 187 Fed. Rep. 94; *Whipple* v. *Mississippi & Yazoo Packet Co.*, 34 Fed. Rep. 54; *McIver & Co., Ltd.*, v. *Tate Steamers, Ltd.*, [1903] 1 K. B. 362; *Park* v. *Duncan & Sons*, 35 Scottish Law Rep. 378. If *Giertsen* v. *Turnbull & Co.*, 45 Scottish Law Rep. 916, strongly relied upon by the owners, is inconsistent with this view, it should be disregarded.

*Fourth.* The vessel was owned 54/80ths by Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach; 10/80ths by Edgar F. Luckenbach, individually; and 16/80ths by John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach. All of these parties were impleaded as owners. The charter party was signed only by "Estate of Lewis Luckenbach,

per Edgar F. Luckenbach, *Trustee;*" but it was admitted by all the petitioners that Edgar F. Luckenbach, Trustee, in so signing the charter party, acted for all the owners and intended to bind all. The decree in the District Court declares that libelant was entitled to recovery "from the respondents Edgar F. Luckenbach et al., her owners." The decree in the Circuit Court of Appeals adjudged (presumably through inadvertence) that the payment should be made by "the Estate of Luckenbach." The right to recover against all the owners, for the full amount, in case any of them was so liable, was not controverted. The decree of the Circuit Court of Appeals should be modified so as to render all the owners liable. Compare *Pendleton* v. *Benner Line*, 246 U. S. 353. As so modified, the decree is

*Affirmed.*